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## Youngstown Revisited

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# Youngstown Revisited

by CHRISTOPHER BRYANT AND CARL TOBIAS\*

One half century ago, President Harry S. Truman promulgated an Executive Order that authorized federal government seizure and operation of the nation's steel mills to support United States participation in the Korean conflict.<sup>1</sup> The president relied on his power as commander-in-chief of American armed forces, other executive authority provided by Article II in the United States Constitution, the need for sustaining the American military effort, and temporal exigencies. Eight weeks later, the United States Supreme Court held that Truman lacked any power to seize the property of American steel companies in *Youngstown Sheet & Tube Co. v. Sawyer*.<sup>2</sup>

On November 13, 2001, President George W. Bush promulgated an Executive Order that authorized trial by military commissions of non-United States citizens whom the American government suspects of terrorism in domestic cases and concomitantly denied these persons access to the federal courts.<sup>3</sup> Bush, like Truman, premised this

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1. Exec. Order No. 10340 (directing the Secretary of Commerce to take possession of and operate the plants and facilities of certain steel companies), 17 FED. REG. 3139 (Apr. 10, 1952).

2. 343 U.S. 579 (1952). See generally MAEVA MARCUS, TRUMAN AND THE STEEL SEIZURE CASE (1994); Grant McConnell, THE STEEL SEIZURE OF 1952 (THE INTER-UNIVERSITY CASE PROGRAM NO. 52, 1960); WILLIAM H. REHNQUIST, THE SUPREME COURT 76, 151-92, 220, 273 (2001); ALAN F. WESTIN, THE ANATOMY OF A CONSTITUTIONAL LAW CASE (1958).

3. Military Order of November 13, 2001: Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 66 Fed. Reg. 57, 833 (Nov. 16, 2001) [hereinafter Bush Order]. See also Department of Defense, Military Commission Order No. 1 (Mar. 21, 2002) at <http://www.dtic.mil/whs/directives/corres/mco/mco1.pdf> [hereinafter DOD Order].

action on executive power, namely his authority as commander-in-chief, the necessity to wage the war against terrorism following the September 11 attacks, and time restraints.

The respective presidential initiatives five decades apart can be distinguished. For instance, the chief executives addressed discrete factual scenarios, which created distinct national emergencies. Careful scrutiny, however, reveals that the two endeavors are in fact strikingly analogous. For example, both the Truman and Bush efforts raised profound separation of powers concerns. Both presidents resorted to their executive authority derived from Article II as justifications for extraordinary domestic actions, when fighting undeclared "wars." The leaders, therefore, exercised legislative power in derogation of the Constitution's express proviso that assigns Congress, not the president, lawmaking responsibility.

The specific Bush Administration claim to executive authority would prescribe federal court jurisdiction, an enumerated power that Articles I and III confer on Congress in explicit terms, while it would proscribe even threshold judicial consideration of the initiative's constitutionality. This assertion of authority is at once unsupported, imperial, and sweeping. Indeed, the November order could undermine not only legislative, but also judicial power, and, thus, jeopardize the finely wrought balance among the federal government's tripartite, co-equal branches. Because the Bush endeavor more substantially invades Congress' province and concentrates federal authority in the president than the corresponding Truman Administration action, *Youngstown* applies with greater force to the fundamental questions the recent initiative presents.

These propositions mean the Executive Order issued last November 13, 2001 warrants analysis through the prism of *Youngstown* on the landmark decision's fiftieth anniversary. Our article undertakes this effort and ascertains that the president has no power to bar those individuals who are covered by the Bush Order from invoking the jurisdiction of the federal courts.<sup>4</sup>

We first explore the origins and development of the critical is-

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4. Litigation challenging detainment or military trials outside the United States may raise additional statutory and constitutional issues that are beyond this article's scope. See *infra* note 10 and accompanying text. See also John Mintz, *Qatar Lawyer Builds Case for Detainees At Guantanamo Bay*, WASH. POST, May 13, 2002, at A3 (discussing litigation challenging detainment of prisoners at Guantanamo Bay, Cuba). See generally *Law and the War on Terrorism*, 25 HARV. J.L. & PUB. POL'Y 399-834 (2002); Neal K. Katyal & Laurence H. Tribe, *Waging War, Deciding Guilt: Trying the Military Tribunals*, 111 YALE L.J. 1259 (2002).

sues, which implicate the Constitution, judicial jurisdiction, and inter-branch authority. The section assesses relevant constitutional text, applicable history, and governing Supreme Court case precedent. It finds that specific language in the Constitution bestows on Congress, rather than the chief executive, almost plenary power to establish the federal courts and to delineate their jurisdiction.

The article next evaluates legal measures that responded to the September 11 terrorist strikes. Our focus is the USA PATRIOT ACT and the Bush Order for which we survey considerable background information. Illustrative are the statute's legislative history as well as pronouncements related to the enactment and the November order by legislators, the Chief Executive, and Cabinet members, including Attorney General John Ashcroft and Secretary of Defense Donald Rumsfeld.

The third part examines the "police action" in Korea during the early 1950s. We canvass numerous presidential administrations' requests that Congress authorize executive branch seizure of various industrial enterprises as a technique for settling labor-management disputes and review ways in which lawmakers treated these overtures. This segment then analyzes the Truman Administration order that seized the steel mills. The portion ends with an assessment of the Supreme Court opinion in *Youngstown*, which invalidated the seizure, and the meaning subsequently accorded that crucial decision.

Section four applies *Youngstown* to the November Executive Order and ascertains that the directive is unconstitutional, insofar as it precludes federal courts from exercising jurisdiction granted by federal statute. President Bush's claim of power usurps legislative authority that the Constitution explicitly reserves for Congress: the political branch Articles I and III power to establish the judiciary and designate its jurisdiction.

The article concludes by urging the Bush Administration not to invoke the Order's provision that purportedly eliminates any federal court scrutiny of, or intervention in, detainment or trials authorized by the directive. We believe that this assertion of power would erode legislative and judicial authority, upsetting the meticulously calibrated equilibrium among the federal government's three coordinate branches.

## **I. Article III, Constitutional History and the Jurisdictional Question**

Section 7(b) of the November 13, 2001 Executive Order provides

in pertinent part that the “military tribunals [established by the directive] shall have exclusive jurisdiction with respect to offenses by” any person subject to the Order, who:

shall not be privileged to seek any remedy or maintain any proceeding, directly or indirectly, or to have any such remedy or proceeding sought on the individual’s behalf, in (i) any court of the United States, or any State thereof, (ii) any court of any foreign nation, or (iii) any international tribunal.<sup>5</sup>

The directive’s expansive terminology sweeps within the compass of its prohibition *all* courts - federal, state, foreign, or international - apart from the military commissions created by the Order itself. Our focus is the Bush Administration’s attempt in section 7(b) to strip *federal* courts of jurisdiction granted by statutes that implement Article III of the Constitution.<sup>6</sup>

Federal courts have limited subject matter jurisdiction and may adjudicate a dispute only when Congress expressly empowers them to do so and, therefore, differ from state courts, which are presumed to enjoy general jurisdiction.<sup>7</sup> Federal courts have jurisdiction solely over those “Cases” and “Controversies” specified in Article III, Section 2 of the United States Constitution.<sup>8</sup> Moreover, this constitutional enumeration is not self-executing; a federal statute must explicitly authorize the exercise of federal judicial power.<sup>9</sup> Thus, insofar as particular cases or controversies that implicate the Bush Order

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5. Bush Order, *supra* note 3; see also *infra* notes 75-85 and accompanying text (assessing Bush Order).

6. Therefore, we do not evaluate the legality of the Order’s attempt to deprive state, foreign, or international courts or tribunals of power to accord those individuals whom the directive covers relief. The Supreme Court sharply limited the ability of state courts to grant people in federal officers’ custody relief in *Tarble’s Case*, 80 U.S. 397, 412 (1872). See also *McClung v. Silliman*, 19 U.S. 598, 605 (1821) (denying state courts the power to issue writs of mandamus to federal officers). See generally MARTIN REDISH, *FEDERAL JURISDICTION* 156-64 (2d ed. 1990); CHARLES ALAN WRIGHT & MARY KAY KANE, *LAW OF FEDERAL COURTS* 41 (6th ed. 2002); Charles Warren, *Federal and State Court Interference*, 43 HARV. L. REV. 345, 347-59 (1930).

7. ERWIN CHERMERINSKY, *FEDERAL JURISDICTION* 257 (3d ed. 1999); LAWRENCE M. FRIEDMAN, *A HISTORY OF AMERICAN LAW* 125 (1973); RICHARD POSNER, *THE FEDERAL COURTS* 296 (1996); LAURENCE TRIBE, *AMERICAN CONSTITUTIONAL LAW* 207 (3d ed. 2000); WRIGHT & KANE, *supra* note 6, at 27.

8. *Flast v. Cohen*, 392 U.S. 83, 94 (1968). See also *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 559 (1992); U.S. CONST. art. III, § 2, cl. 1. See generally FLEMING JAMES, JR. ET AL., *CIVIL PROCEDURE* 55 (5th ed. 2001); TRIBE, *supra* note 7, at 385; WRIGHT & KANE, *supra* note 6, at 61-62.

9. See *Bender v. Williamsport Area Sch. Dist.*, 475 U.S. 534 (1988). See also CHERMERINSKY, *supra* note 7, at 258; JACK FRIEDENTHAL ET AL., *CIVIL PROCEDURE* 9-13 (3d ed. 1999); REDISH, *supra* note 6, at 25.

might, for whatever reason, exceed the scope of any legislative jurisdictional grant, the section 7(b) prohibition on federal court jurisdiction's exercise is mere surplusage.<sup>10</sup> Therefore, our concern is with the category of lawsuits for which federal statutes provide federal courts with jurisdiction, but which section 7(b) purports to insulate from any judicial scrutiny. Of course, the administration officials who drafted the Bush Order must have intended to affect precisely that group of cases by mentioning "any court of the United States" in section 7(b).

Whether a federal court retains jurisdiction, even to consider a covered individual's request for any form of relief, in exactly such a suit - in other words, whether section 7(b) fails in its apparent purpose - is a question that a federal judge must address at the litigation's outset, regardless of how strong the case is on the merits. As the Supreme Court recently admonished the lower federal courts, "[t]he requirement that jurisdiction be established as a threshold matter 'spring[s] from the nature and limits of the judicial power of the United States' and is 'inflexible and without exception.'"<sup>11</sup> The Court stressed that, absent subject matter jurisdiction, a federal judge lacks authority to resolve on the merits even the clearest legal issue: "Without jurisdiction the court cannot proceed at all in any cause. Jurisdiction is power to declare the law, and when it ceases to exist, the only function remaining to the court is that of announcing the fact

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10. Thus, even if, as we argue below, Bush had no power to proscribe federal court jurisdiction, federal courts may lack jurisdiction to address claims raised by or on behalf of some persons subject to the Order. *Cf. Eisentrager v. Forrestal*, 174 F.2d 961, 968 (D.C. Cir. 1949) (reversing district court finding that no federal court had statutory jurisdiction to entertain habeas corpus petitions filed on behalf of German nationals accused of war crimes and held in custody by U.S. military in Germany). Whether denial of any judicial remedy would violate Article III or the Fifth Amendment's Due Process Clause is a separate issue beyond this article's scope. *Id.* at 967 (finding unconstitutional withdrawal of statutory authorization to grant writ), *rev'd*, *Johnson v. Eisentrager*, 339 U.S. 763, 790-91 (1950) (denying relief without clarifying whether petitioners' custody was lawful or simply beyond federal court scrutiny). *See also Rasul v. Bush*, 215 F. Supp. 2d 55 (D.D.C. 2002) (reading *Eisentrager* to preclude jurisdiction to entertain petitions for the writ of habeas corpus filed by detainees held by the U.S. military at Guantanamo Bay, Cuba); RICHARD H. FALLON ET AL., *HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 365 (4th ed. 1996) [hereinafter *HART & WECHSLER*]; WRIGHT & KANE, *supra* note 6, at 47, 298; Jordan P. Paust, *Antiterrorism Military Commissions: Courting Illegality*, 23 MICH. J. INT'L L. 1, 23-25 (2001); Wayne E. Thomas, Note, *Federal Courts-Habeas Corpus - Jurisdiction*, 28 TEX. L. REV. 727 (1950).

11. *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 94-95 (1998) (quoting *Mansfield, C. & L.M.R. Co. v. Swan*, 111 U.S. 379, 382 (1884)). *See generally* TRIBE, *supra* note 7, at 389; Scott C. Idleman, *The Demise of Hypothetical Jurisdiction in the Federal Courts*, 52 VAND. L. REV. 235 (1999).

and dismissing the cause.”<sup>12</sup> For these reasons, whenever a person affected by the Bush Order asks a federal court for relief from any action taken pursuant to the directive, the federal judge who receives the person’s plea must determine whether section 7(b) deprives the court of subject matter jurisdiction it would otherwise exercise pursuant to federal legislation that implements Article III, Section 2 in the Constitution. Although section 7(b) purports to strip courts of jurisdiction, we conclude below that the Bush Order unconstitutionally intrudes upon the province of Congress, at least to this extent.

Thus, in any case in which individuals whom the directive governs invoke federal court jurisdiction, most probably under the statutes empowering federal judges to grant the writ of habeas corpus in broadly defined classes of cases,<sup>13</sup> the federal courts must consider the question that we address here, notwithstanding the relative merits of any claims for relief asserted. Because the issue presented by section 7(b) concerns the courts’ subject matter jurisdiction and, therefore, requires threshold resolution, the arguments we elaborate below to support our conclusion that section 7(b) is unconstitutional must be assessed independent of certain controversial, ongoing debates. These debates include those concerning the extent of constitutional rights possessed by non-United States citizens,<sup>14</sup> the Bill of Rights’

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12. *Steel Co.*, 523 U.S. at 94 (quoting *Ex Parte McCordle*, 74 U.S. 506, 514 (1869)). The Supreme Court explained:

Much more than legal niceties are at stake here. The statutory and (especially) constitutional elements of jurisdiction are an essential ingredient of separation and equilibration of powers, restraining the courts from acting at certain times, and even restraining them from acting permanently regarding certain subjects. For a court to pronounce upon the meaning or the constitutionality of a state or federal law when it has no jurisdiction to do so is, by very definition, for a court to act *ultra vires*.

*Id.* at 101-02 (citations omitted).

13. 28 U.S.C. §§ 2241-55 (1994); HART & WECHSLER, *supra* note 10, at 1337-467; JAMES S. LIEBMAN & RANDY HERTZ, *FEDERAL HABEAS CORPUS PRACTICE AND PROCEDURE* (3d ed. 1998); IRA ROBBINS, *HABEAS CORPUS CHECKLISTS* (1998); TRIBE, *supra* note 7, at 300; WRIGHT & KANE, *supra* note 6, at 352-69. See generally Mintz, *supra* note 4, at A3 (discussing pending litigation).

14. Compare TASK FORCE ON TERRORISM AND THE LAW, AMERICAN BAR ASSOCIATION, REPORT AND RECOMMENDATIONS ON MILITARY COMMISSIONS 10 (Jan. 4, 2002) available at <http://www.abanet.org/leadership/military.pdf> [hereinafter ABA REPORT & RECOMMENDATIONS] (Aliens present in the United States, even unlawfully, are entitled to due process), with Griffin Bell, *The Constitution Doesn't Protect Foreign Terrorists*, WALL ST. J., Sept. 26, 2001, at A20 (stating “Supreme Court has not decided definitively whether illegal aliens are protected by the Fourth Amendment”). See also TRIBE, *supra* note 7, at 968-73; Kenneth Anderson, *A Qualified Defense of Military Commissions*, 25 HARV. J.L. & PUB. POL’Y 590, 611-13 (2002); David Cole, *Enemy Aliens*, 54 STAN. L. REV. 953, 978-88 (2002); Philip Heymann, *Civil Liberties and Human Rights in*

applicability to persons accused of committing war crimes,<sup>15</sup> whether the Order “suspend[s]” the “privilege of the writ of habeas corpus” and, if so, whether the rigorous conditions in Article I, Section 9, Clause 2 are satisfied.<sup>16</sup> Similarly immaterial to our contentions are whether the substantive commands of the Bush Order, as distinct from section 7(b)’s attempt to abrogate the federal judicial power, receive support under World War II precedents, such as *Ex Parte Quirin*,<sup>17</sup> or fail the test enunciated by the Reconstruction Era ruling *Ex Parte Milligan*.<sup>18</sup> It warrants emphasis that the Court, in both cases, exercised federal judicial authority and resolved challenges to the constitutionality of presidential orders on the merits – performing just the kind of judicial scrutiny of executive action that section 7(b) of the Bush Order attempts to preclude.<sup>19</sup> Our thesis is that, despite

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*the Aftermath of September 11*, 25 HARV. J.L. & PUB. POL’Y 441 (2002); Paust, *supra* note 10.

15. Compare ABA REPORT & RECOMMENDATIONS, *supra* note 14, at 10 (non-citizens, whether “lawfully in the U.S., are entitled to [] Fifth and Sixth Amendment [rights] before criminal penalties may be imposed”), with Bell, *supra* note 14 (asserting that “counter-foreign terrorism, as distinct from law enforcement, is not generally subject to the guarantees in the Bill of Rights, including the Fourth Amendment”). See also TRIBE, *supra* note 7, at 299-300; Anderson, *supra* note 14, at 613-31; CRIMES OF WAR: WHAT THE PUBLIC SHOULD KNOW 130 (Roy Gutman & David Rieff eds., 1999); *Winging it at Guantanamo*, N.Y. TIMES, Apr. 23, 2002, at A28 [hereinafter *Winging it at Guantanamo*].

16. ABA REPORT & RECOMMENDATIONS, *supra* note 14, at 11 (finding Bush Order to “not expressly suspend” habeas corpus writ and opining that it is “most unlikely that it could.”); *INS v. St. Cyr*, 533 U.S. 289, 289-90 (2001); Richard Fallon, *Applying the Suspension Clause to Immigration Cases*, 98 COLUM. L. REV. 1068, 1070-71 (1998); Gerald Neuman, *Habeas Corpus, Executive Detention, and the Removal of Aliens*, 98 COLUM. L. REV. 961, 969-87 (1998); Gerald Neuman, *Jurisdiction and the Rule of Law After the 1996 Immigration Act*, 113 HARV. L. REV. 1963, 1964 (2000).

17. 317 U.S. 1 (1942). See also Cyrus Bernstein, *The Saboteurs’ Trial*, 11 GEO. WASH. L. REV. 131 (1943); Daniel J. Danelski, *The Saboteurs’ Case*, 1 J. SUP. CT. HIST. 61 (1996); George P. Fletcher, *On Justice and War: Contradictions in the Proposed Military Tribunals*, 25 HARV. J.L. & PUB. POL’Y 635, 640-42 (2002).

18. 71 U.S. 2 (1866). See generally CHARLES FAIRMAN, *HISTORY OF THE SUPREME COURT: RECONSTRUCTION AND REUNION 1864-88*, at 182-252 (1971); HART & WECHSLER, *supra* note 10, at 369; JOHN E. NOWAK & RONALD D. ROTUNDA, *CONSTITUTIONAL LAW* 259 (6th ed. 2000); TRIBE, *supra* note 7, at 299.

19. *Quirin*, 317 U.S. at 24-25; *Milligan*, 71 U.S. at 109-17. See also Viet Dinh, *Foreword: Freedom and Security After September 11*, 25 HARV. J.L. & PUB. POL’Y 399, 405-06 (2002). The proclamation in *Quirin* resembles § 7(b). Compare Proclamation No. 2561, 7 FED. REG. 5101 (1942), with Bush Order, *supra* note 3, § 7(b); see also Noah Feldman, *Choices of Law, Choices of War*, 25 HARV. J.L. & PUB. POL’Y 457, 471 (2002). Some reason that *Quirin*’s merits resolution of saboteurs’ claims shows § 7(b) is unconstitutional, and, thus, deserves only cursory analysis. See ABA REPORT & RECOMMENDATIONS, *supra* note 14, at 11; Katyal & Tribe, *supra* note 4, at 1263 n.12, 1281-84. We also find § 7(b) unconstitutional, see *infra* text accompanying notes 250-67, but the issue requires thorough



section 7(b), the federal courts, and ultimately the United States Supreme Court, can exercise judicial power and decide on the merits these and other constitutional issues raised by the Order's substantive provisions. We do not, however, address how the courts should resolve any of these merits issues. Accordingly, we do not contend that the Bush Order's authorization of detention and military trial of covered individuals necessarily violates the Constitution in every, or even in any, instance.

The remainder of part I briefly reviews the constitutional text, history, and caselaw establishing that Congress, not the President, is the political branch of the federal government that the Constitution empowers to prescribe federal court jurisdiction. Neither our conclusion nor its support is at all novel or controversial; to the contrary, the proposition is uncontested. Nevertheless, a concise survey of these arguments and their underlying substantiation is essential, as they afford one predicate for our perhaps more controversial conclusion — namely, that the Constitution's express authorization of Congress as the institution to create the federal courts and prescribe their jurisdiction by necessary implication denies this power to the President when acting alone.

#### **A. Congressional Power over the Appellate Jurisdiction of the Supreme Court**

Beginning at the apex of the federal judicial hierarchy, Article III, Section 2 of the Constitution provides the categories of cases over which “the supreme Court shall have Appellate Jurisdiction, both as to Law and Fact, *with such Exceptions*, and under such Regulations as the *Congress* shall make.”<sup>20</sup> The High Court has long held that this

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analysis, as *Quirin* is not dispositive. The Court identified no constitutional basis to ignore the proclamation's jurisdiction-stripping terms, and alternatively suggested the merits holding meant it had “no occasion to decide” about jurisdiction, which the U.S. did not contest. *Quirin*, 317 U.S. at 25. See generally Lloyd Cutler, *Lessons On Tribunals-From 1942*, WALL ST. J., Nov. 31, 2001, at A9; Paust, *supra* note 10.

20. U.S. CONST. art. III, § 2, cl. 2 (emphasis added). Since *Ex Parte Bollman*, the Court has construed federal statutes empowering it to grant the writ of habeas corpus (often called the Court's power to grant an “original” writ to distinguish this jurisdiction from its review of a lower court through certiorari power) as creating an alternative way to review a lower court decision denying the writ. 8 U.S. 75, 100 (1807); see also *Ex Parte Yerger*, 75 U.S. 85, 98 (1869) (in proper cases the Court, under the 1789 Act and all later acts that give “jurisdiction in cases of habeas corpus may, *in the exercise of its appellate power*, revise the decisions of the inferior courts of the United States, and relieve from unlawful imprisonment authorized by them, except in cases within some limitations of the jurisdiction by Congress”) (emphasis added); FAIRMAN, *supra* note 18, at 558-618. By placing this class of cases within the Court's “appellate jurisdiction,” the Court avoided finding

so-called “exceptions clause” of Article III authorizes lawmakers to enact statutes denying the Supreme Court appellate jurisdiction over cases that the specific enumeration in Article III would otherwise include.

The Court’s pathbreaking decision *Ex Parte McCardle* was one of the earliest, and most dramatic, judicial articulations of this principle.<sup>21</sup> In circumstances remarkably similar to those of today, United States military authorities imprisoned McCardle, who was a civilian and a vocal critic of congressional reconstruction policy, pending trial before a military commission.<sup>22</sup> McCardle petitioned the circuit court for the southern district of Mississippi, where he was detained, for a writ of habeas corpus, and ironically invoked the February 5, 1867 expansion by the Reconstruction Congress of federal court power to grant the writ.<sup>23</sup> McCardle asserted various challenges to his confinement’s legality and specifically alleged that the Military Reconstruction Act,<sup>24</sup> which authorized trial of southern civilians before military tribunals, violated the Sixth Amendment guarantee of trial

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that a statute granting it authority to entertain an “original” petition for the writ unconstitutionally extended its “original Jurisdiction” within Article III’s meaning. *Bollman*, 8 U.S. at 101 (thus distinguishing *Marbury v. Madison*’s conclusion that the Judiciary Act of 1789 provision empowering the Court to grant a writ of mandamus as an original matter violated Article III’s limitation on its “original Jurisdiction”). See also HART & WECHSLER, *supra* note 10, at 1340; TRIBE, *supra* note 7, at 268. More critical here, this same classification of the Court’s power to entertain “original” petitions for the habeas corpus writ as part of its “appellate Jurisdiction” within Article III also means that Congress’ power to make “Exceptions” to this jurisdiction apparently covers the Court’s power to entertain “original” petitions for the writ. See REDISH, *supra* note 6, at 27, 48; Dallin H. Oaks, *The “Original” Writ of Habeas Corpus in the Supreme Court*, 1962 SUP. CT. REV. 153.

21. 74 U.S. 506, 514 (1869). See generally FAIRMAN, *supra* note 18, at 433-514; TRIBE, *supra* note 7, at 271-72; William W. Van Alstyne, *A Critical Guide to Ex Parte McCardle*, 15 ARIZ. L. REV. 229 (1973).

22. 74 U.S. at 507-08. See also FAIRMAN, *supra* note 18, at 438; Van Alstyne, *supra* note 21, at 236.

23. *McCardle*, 74 U.S. at 507-08. The 1867 Act states in pertinent part:

[T]he several courts of the United States, and the several justices and judges of such courts, within their respective jurisdictions, in addition to the authority already conferred by law, shall have power to grant writs of habeas corpus in all cases where any person may be restrained of his or her liberty in violation of the constitution, or of any treaty or law of the United States . . . .

Act of February 5, 1867, ch. 28, § 1, 14 Stat. 385. See also Van Alstyne, *supra* note 21, at 234-36.

24. Act of March 2, 1867, ch. 153, 14 Stat. 428. See also HART & WECHSLER, *supra* note 10, at 1341. See generally FAIRMAN, *supra* note 18, at 333-43, 499-501; Stanley Kutler, *Ex Parte McCardle: Judicial Impotency? The Supreme Court and Reconstruction Reconsidered*, 72 AM. HIST. REV. 835, 842 (1967).

by an impartial jury.<sup>25</sup> The circuit court rejected McCardle's claims, and he appealed this decision to the Supreme Court under the terms of the February 5, 1867 Act.

In March 1868, after the Court had heard argument on the merits of McCardle's appeal, but before the Justices held conference on the matter, Congress enacted a statute providing,

[S]o much of the act approved February 5, 1867 . . . as authorized an appeal from the judgment of the Circuit Court to the Supreme Court of the United States, or the exercise of any such jurisdiction by said Supreme Court, on appeals which have been, or may hereafter be taken, be, and the same is hereby repealed.<sup>26</sup>

The Court stayed action on the cause and afforded the parties an opportunity to be heard on the repealer's effect.<sup>27</sup> Thereafter, a unanimous High Court, speaking through Chief Justice Chase, concluded it lacked jurisdiction over McCardle's appeal.

The opinion by Chief Justice Chase for the Supreme Court was simple nearly to the point of tautology.<sup>28</sup> The Chief Justice observed that Article III granted Congress the power to make exceptions to the Court's appellate jurisdiction and emphasized that "[i]t is hardly possible to imagine a plainer instance of positive exception" than the 1868 repealer.<sup>29</sup> Chase continued:

We are not at liberty to inquire into the motives of the legislature. We can only examine into its power under the Constitution; and the power to make exceptions to the appellate jurisdiction of this court is given by express words.

What, then, is the effect of the repealing act upon the case before us? We cannot doubt as to this. Without jurisdiction the court cannot proceed at all in any cause. Jurisdiction is power to declare the law, and when it ceases to exist, the only function remaining to the court is that of announcing the fact and dis-

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25. See FAIRMAN, *supra* note 18, at 455. See generally Van Alstyne, *supra* note 21, at 238.

26. Act of March 27, 1868, 15 Stat. 44. See generally FAIRMAN, *supra* note 18, at 439-66; NOWAK & ROTUNDA, *supra* note 18, at 36; REHNQUIST, *supra* note 2, at 272; Van Alstyne, *supra* note 21, at 239-41.

27. See *McCardle*, 74 U.S. at 509. See generally Van Alstyne, *supra* note 21, at 241-42.

28. Chase's "opinion made it seem quite simple[, but] the issue was by no means so simple as Chase made it appear in *McCardle*." DAVID P. CURRIE, *THE CONSTITUTION IN THE SUPREME COURT: THE FIRST HUNDRED YEARS, 1789-1888*, at 305 (1985). See generally Van Alstyne, *supra* note 21, at 242-44.

29. *McCardle*, 74 U.S. at 514; see U.S. CONST. art. III, § 2, cl. 2. See generally NOWAK & ROTUNDA, *supra* note 18, at 36; REHNQUIST, *supra* note 2, at 272-73.

missing the cause.<sup>30</sup>

The Supreme Court did precisely that, and the Chief Justice dismissed the *McCardle* appeal “for want of jurisdiction” after the jurist distinguished the precedents that counsel for *McCardle* had proffered.<sup>31</sup> The determination is significant for our purposes, because the decision represents a vivid illustration of the proposition that the Constitution vests Congress, rather than the president,<sup>32</sup> with the authority to regulate the appellate jurisdiction of the Supreme Court.<sup>33</sup>

## B. Congressional Power Over the Original Jurisdiction of the Lower Federal Courts

The first significant controversy concerning the federal judiciary arose in the Constitutional Convention of 1787 when the delegates debated whether it was advisable to establish *inferior* federal courts at all.<sup>34</sup> On June 5, 1787, John Rutledge of South Carolina, who would subsequently become one of the first United States Supreme Court

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30. *McCardle*, 74 U.S. at 514. See generally Van Alstyne, *supra* note 21, at 245-67.

31. See *McCardle*, 74 U.S. at 514-15. See generally FAIRMAN, *supra* note 18, at 455-56.

32. Indeed, in *McCardle*, the Congress had enacted the repealer over President Andrew Johnson's veto. See *McCardle*, 74 U.S. at 508; FAIRMAN, *supra* note 18, at 469; Van Alstyne, *supra* note 21, at 239.

33. This idea about the political branches' relative constitutional competence is not diminished by later judicial and academic conclusions that other portions of the Constitution restrict Congress' power to limit the Court's appellate jurisdiction. See, e.g., *Ex Parte Yerger*, 75 U.S. at 106 (holding the Constitution's text and history justified a narrow construction of the 1868 repealer as affecting only appeals to the Court under the 1867 Act, thus leaving undisturbed power to grant writ under other, prior jurisdictional grants); *United States v. Klein*, 80 U.S. 128, 146 (1871) (holding unconstitutional a statute purporting to deprive the Court of appellate jurisdiction in certain cases in which recipients of presidential pardons brought claims against the United States); cf. *Battaglia v. General Motors Corp.*, 169 F.2d 254 (2d Cir. 1948) (reasoning that Fifth Amendment due process guarantee limits Congress' power over state and federal court jurisdiction). See also James E. Pfander, *Jurisdiction-Stripping and the Supreme Court's Power to Supervise Inferior Tribunals*, 78 TEX. L. REV. 1433, 1436-42 (2000) (providing recent review of enduring academic debate over Constitution's limits on Congress' Article III power to govern the Supreme Court's appellate jurisdiction). See generally Akhil Reed Amar, *A Neo-Federalist View of Article III*, 65 B.U.L. REV. 205 (1985); John Harrison, *The Power of Congress to Limit the Jurisdiction of Federal Courts and the Text of Article III*, 64 U. CHI. L. REV. 203 (1997); Henry M. Hart, Jr., *The Power of Congress to Limit the Jurisdiction of the Federal Courts: An Exercise in Dialectic*, 66 HARV. L. REV. 1362 (1953); Bernard J. Meltzer, *The History and Structure of Article III*, 148 U. PA. L. REV. 1569 (1997); Lawrence Gene Sager, *Klein's First Principle: A Proposed Solution*, 86 GEO. L.J. 2525 (1998).

34. See CATHERINE DRINKER BOWEN, *MIRACLE AT PHILADELPHIA* 62-66 (1966); CHEREMINSKY, *supra* note 7, at 2-4. See generally HART & WECHSLER, *supra* note 10, at 8; REDISH, *supra* note 6, at 7-8.

Justices, opposed the creation of lower federal courts, “arguing that the State Tribunals might and ought to be left in all cases to decide in the first instance[,] the right of appeal to the supreme national tribunal being sufficient to secure national rights [and] uniformity” of decisions.<sup>35</sup> The view espoused by Rutledge prevailed when the delegates voted,<sup>36</sup> although James Madison of Virginia and James Wilson of Pennsylvania had both asserted the need for lower federal courts.<sup>37</sup> Fortunately, this ballot did not prove to be dispositive, as Madison and Wilson snatched victory from the jaws of defeat by immediately proposing a compromise measure - “that the National Legislature be empowered to institute inferior tribunals,”<sup>38</sup> while they “observed that there was a distinction between establishing such tribunals absolutely, and giving a discretion to the Legislature to establish or not establish them.”<sup>39</sup> Of course, this suggestion, thereafter denominated “the Madisonian compromise,”<sup>40</sup> secured the Convention’s approval. The idea is embodied in Article I, Section 8 of the Constitution, which provides “The Congress shall have Power . . . To constitute Tribunals inferior to the supreme Court,” and Article III, Section 1, which states “The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish.”<sup>41</sup> Moreover, the nascent national legislature promptly created the lower federal courts and prescribed their jurisdiction in the Judiciary Act of 1789.<sup>42</sup>

In *Sheldon v. Sill*,<sup>43</sup> the Supreme Court concluded that the Con-

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35. 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 124 (Max Farrand, ed., 1911) [hereinafter “Farrand”]. Roger Sherman of Connecticut joined in opposing lower courts, stressing “the supposed expensiveness of having a new set of Courts, when the existing State Courts would answer the same purpose.” *Id.* at 125.

36. 1 Farrand, *supra* note 35, at 124-25; CHEMERINSKY, *supra* note 7, at 4; REDISH, *supra* note 6, at 8.

37. 1 Farrand, *supra* note 35, at 125. See generally BOWEN, *supra* note 34, at 62-66.

38. 1 Farrand, *supra* note 35, at 125. See also IRVING BRANT, JAMES MADISON, FATHER OF THE CONSTITUTION (1950); GARY WILLS, JAMES MADISON (2002); WRIGHT & KANE, *supra* note 6, at 2.

39. 1 Farrand, *supra* note 35, at 125; CHEMERINSKY, *supra* note 7, at 4.

40. See HART & WECHSLER, *supra* note 10, at 8; REDISH, *supra* note 6, at 8. See generally Michael G. Collins, *Article III Cases, State Court Duties, and the Madisonian Compromise*, 1995 WIS. L. REV. 39.

41. U.S. CONST. art. I, § 8, cl. 9; art. III, § 1.

42. Judiciary Act of 1789, 1 Stat. 73 (1789). See CHEMERINSKY, *supra* note 7, at 9-12. See generally FELIX FRANKFURTER & JAMES LANDIS, THE BUSINESS OF THE SUPREME COURT (1927); Charles Warren, *New Light on the History of the Federal Judiciary Act of 1789*, 37 HARV. L. REV. 49 (1923).

43. 49 U.S. 441 (1850). See generally HART & WECHSLER, *supra* note 10, at 358-65;

stitution's grant to Congress of the greater power to determine "from time to time" whether any inferior federal courts should be "ordain[ed] and establish[ed]" included the lesser power of creating these courts but vesting the tribunals with jurisdiction over less than all the categories of cases and controversies enumerated in Article III.<sup>44</sup> The High Court, therefore, upheld the constitutionality of the section in the Judiciary Act of 1789, which precluded federal courts from hearing cases when the diversity of the parties resulted from the assignment of a chose in action.<sup>45</sup> Sill, the plaintiff-assignee, a citizen of New York, who had sued a citizen of Michigan, contended that the anti-assignment provision of the Judiciary Act violated Article III's command that "[t]he judicial Power [of the United States] shall extend to . . . Controversies . . . between Citizens of different States."<sup>46</sup>

The High Court rejected this assertion and stated:

It must be admitted, that if the Constitution had ordained and established the inferior [federal] courts, and distributed to them their respective powers, they could not be restricted or divested by Congress. But as it has made no such distribution, one of two consequences must result, - either that each inferior court created by Congress must exercise all the judicial powers not given to the Supreme Court, or that Congress, having the power to establish the courts, must define their respective jurisdictions. The first of these inferences has never been asserted, and could not be defended with any show of reason, and if not, the latter would seem to follow as a necessary consequence. And it would seem to follow, also, that, having a right to prescribe, Congress may withhold from any court of its creation jurisdiction of any of the enumerated controversies. Courts created by statute can have no jurisdiction but such as the statute confers. No one of them can assert a just claim to jurisdiction exclusively conferred on another, or withheld from all.<sup>47</sup>

Having thus demonstrated the constitutionality of the anti-assignment proviso that lawmakers had included in the Judiciary Act, the Supreme Court reversed the lower court judgment for want of ju-

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REDISH, *supra* note 6, at 29-30; TRIBE, *supra* note 7, at 276; WRIGHT & KANE, *supra* note 6, at 47-48.

44. *Sheldon*, 49 U.S. at 448-49. See also U.S. CONST. art. III, § 1; Harrison, *supra* note 33, at 205; Ronald D. Rotunda, *Congressional Power to Redirect the Jurisdiction of the Lower Federal Courts and the Problem of School Busing*, 64 GEO. L.J. 839, 842-44 (1976); *supra* notes 34-41 and accompanying text.

45. *Sheldon*, 49 U.S. at 448-50. See also 28 U.S.C. § 1359 (1994); *supra* note 42.

46. U.S. CONST. art. III, § 2, cl. 1. See also CHEMERINSKY, *supra* note 7, at 193-94 (discussing *Sheldon*).

47. *Sheldon*, 49 U.S. at 448-49; Rotunda, *supra* note 44, at 842-44.

risdiction, observing that “the disposal of the judicial power (except in a few specified instances) belongs to Congress.”<sup>48</sup>

This segment of the article has examined the premise for the longstanding proposition that the Constitution entrusts the legislative branch with authority over federal court jurisdiction, subject to certain limited restraints. Less well settled is the corollary idea that the Constitution’s grant of this power to Congress by implication denies it to the chief executive acting without statutory authorization. The *Youngstown* determination, which we discuss below in part III, provides the framework for analyzing presidential assertions of power to prescribe federal court jurisdiction independent of Congress. Before exploring that critical precedent, however, the next section summarizes the federal legal response to the September 11 terrorist attacks.

## II. Federal Legal Developments In Counterterrorism After September 11

Congress and the President have both changed federal law in important ways since September 11, 2001. This part assesses the legal responses of the federal government’s political branches to the unprecedented terrorist strikes. We generally conclude, respecting several significant issues addressed by the Bush Order, that the Administration first sought legislative authorization for its initiative, which Congress denied, and then arrogated to itself through the November 13 Executive Order the requested power (including some authority that it had not even pursued).

### A. Legislative History of the USA PATRIOT ACT of 2001

As the United States reeled from the severe blow inflicted by the September 11th terrorist attacks and the country groped towards equilibrium in the strikes’ immediate wake, some federal legislative action clearly became inevitable.<sup>49</sup> Nonetheless, there remained substantial uncertainty about what precise form the response of senators and representatives would assume.<sup>50</sup>

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48. *Sheldon*, 49 U.S. at 449; Harrison, *supra* note 33, at 205. As with Congress’ power over the Supreme Court’s appellate jurisdiction, the existence of constitutional limits on how substantially Congress exercises its power over lower federal court jurisdiction does not diminish the force of the authority demonstrating that the Constitution grants this power to Congress, not the President. See *supra* notes 20-33 and accompanying text.

49. See *Bush Seeks to Expand Legal Arsenal Against Terrorism*, WALL ST. J., Sept. 18, 2001, at A24. See also Richard D. Parker, *Homeland: An Essay on Patriotism*, 25 HARV. J.L. & PUB. POL’Y 407, 427 (2002).

50. Ted Bridis, *Justice Department Asks Congress to Clear Wide Ranging*

Just over a week after the terrorists attacked the United States, the Bush Administration submitted to Congress proposed legislation, titled the Anti-Terrorism Act of 2001 ("ATA"), which addressed a wide spectrum of issues regarding law-enforcement, immigration, and counterterrorism efforts.<sup>51</sup> In the highly-charged atmosphere following the brutal strikes and amidst widespread fears of additional, even more deadly, assaults, senators and representatives encountered extraordinary political pressure to accede to the President's suggestions.<sup>52</sup> Indeed, the Senate had suspended the upper chamber's normal operating procedures and passed through voice-vote in a late-night session on September 13 various appropriation riders, which granted numerous requests from President Bush for increased counterterrorism authority.<sup>53</sup> However, by the next week, the congressional leadership recognized the need for greater deliberation about a number of the Administration's legislative recommendations and scheduled hearings before the Senate and House Judiciary Committees.<sup>54</sup>

Sections 202 and 203 of the Bush Administration draft proposal had the greatest relevance for the matters that the November 13, 2001 Executive Order would subsequently address. Section 202 would have authorized indefinite detention of any non-citizen whom the Attorney General "has reason to believe may commit, further, or facili-

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*Antiterrorism Legislation*, WALL ST. J., Sept. 19, 2001, at A4; see also Kristen Choo, *Controversial Cure*, A.B.A. J., Apr. 2002, at 20.

51. Anti-Terrorism Act of 2001 (Sept. 19, 2001), at [http://www.eff.org/Privacy/Surveillance/20010919\\_ata\\_bill\\_draft](http://www.eff.org/Privacy/Surveillance/20010919_ata_bill_draft); *American Values on Trial*, L.A. TIMES, Mar. 22, 2002, at B16 (hereinafter *American Values on Trial*).

52. John Lancaster, *Hill Puts Brakes on Expanding Police Powers*, WASH. POST, Sept. 30, 2001, at A6 (noting that in "days after September 11, [opinion polls showed] Americans overwhelmingly favored stronger police powers, even at the expense of personal freedom"); Jonathan Krim, *Anti-Terror Push Stirs Fears for Liberties; Rights Groups Unite To Seek Safeguards*, WASH. POST, Sept. 18, 2001, at A17 (reporting that on Sept. 17, 2001, the Attorney General said, "[T]errorists with links to those who committed last week's attacks might still be operating in the United States and that a new set of counterterrorism measures is needed to address the threat"); cf. Leti Volpp, *The Citizen and the Terrorist*, 49 UCLA L. REV. 1575 (2002) (discussing consolidation of a new ethnic identity category, subject to widespread hatred and violence, in the wake of the September 11 terrorist attacks).

53. Krim, *supra* note 52; David Abramowitz, *The President, The Congress, and Use of Force: Legal and Political Considerations in Authorizing Use of Force Against International Terrorism*, 43 HARV. INT'L L.J. 71 (2002). See generally Parker, *supra* note 49, at 427; Paust, *supra* note 10.

54. Lancaster, *supra* note 52; see *Winging it at Guantanamo*, *supra* note 15; *American Values on Trial*, *supra* note 51.



tate acts” of terrorism, defined quite broadly.<sup>55</sup> Section 203 would have vested exclusive authority to conduct federal habeas corpus review of section 202 detentions in the federal courts for the District of Columbia.<sup>56</sup>

Members of Congress, belonging to each major political party,<sup>57</sup> and civil liberty watch-dog organizations<sup>58</sup> vociferously opposed these provisions. Lawmakers, who rejected the plain import of sections 202 and 203 in the Administration’s bill, aggressively questioned those specific provisos during the House Judiciary Committee’s hearing conducted on September 24 and especially in the Senate Judiciary Committee’s hearing the following day. Representatives Jerrold Nadler (D-N.Y.) and Zoe Lofgren (D-Cal.) both voiced “strong concern[s]” about the constitutional validity of section 202’s authorization for indefinite detention.<sup>59</sup> Representative Nadler, in particular, observed that the provision’s low threshold - whether the Attorney General has “reason to believe” that a non-citizen poses a threat to national security - would render the (geographically constrained) provision for federal habeas corpus review included in section 203 an empty, purely “ministerial” protection against potential abuses.<sup>60</sup>

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55. See ATA, *supra* note 51, at § 202; see *Terrorism Investigation and Prosecution: Hearing Before Senate Comm. on the Judiciary*, 107th Cong., 2001 WL 1132689 (Sept. 25, 2001) [hereinafter *Sept. 25 Senate Judiciary Comm. Hearing*] (statement of Sen. Specter quoting § 202 of the Administration’s draft bill). See generally Harold Koh, *The Spirit of the Laws*, 43 HARV. INT’L L.J. 23, 34-36 (2002).

56. ATA, *supra* note 51, § 203. See also *Winging it at Guantanamo*, *supra* note 15.

57. Krim, *supra* note 52. See also *American Values on Trial*, *supra* note 51.

58. Walter Pincus, *Caution Is Urged on Terrorism Legislation: Measures Reviewed To Protect Liberties*, WASH. POST, Sept. 21, 2001, at A22. See also *Editorial: No Rush On Rights*, WASH. POST, Sept. 20, 2001, at A34 (urging rejection of section “allowing indefinite detention and possible deportation of aliens on the strength of no more than certification by the attorney general,” as this power must be “subject to full judicial review or the terrorists will have succeeded already in forcing the country to retreat from its most basic principles”).

59. *Draft Proposals Designed to Combat Terrorism: Hearing of the House Comm. on the Judiciary*, 107th Cong., 2001 WL 1132693 (Sept. 24, 2001) [hereinafter *House Judiciary Comm. Hearing*] (statement of Rep. Nadler) (expressing doubts about § 202, which “would seem to indicate that the Attorney General has basically carte blanche, with only ministerial judicial review, to put someone in jail and keep them there forever with no evidence”); *id.* (statement of Rep. Lofgren) (“[T]he [U.S. Supreme] Court’s been very clear . . . that you can’t keep someone in indefinite detention and be constitutional”); see also Koh, *supra* note 55, at 34-35.

60. Representative Nadler stated,

[J]udicial review [in § 203 seems only to go to the] question of whether the Attorney General has reason to believe. And there’s no standards [which seems] to indicate that the Attorney General has basically carte blanche, *with only ministerial judicial review*, to put someone in jail and keep them there forever with no

The next day, Senator Edward Kennedy (D-Ma.) and Senator Arlen Specter (R-Pa.) amplified these objections when Attorney General John D. Ashcroft appeared before the Senate Judiciary Committee to urge swift enactment of the Administration's bill.<sup>61</sup> The Attorney General insisted that the sole intent underlying section 202 was to authorize the detention of *removable* non-citizens *while removal proceedings were pending*.<sup>62</sup> After Senator Specter remarked that the language in section 202 was much more expansive - authorizing the indefinite detention of any non-citizen, deportable or not<sup>63</sup> - the Attorney General conceded the phraseology might be overbroad and agreed to narrow the terminology and, therefore, reach only those non-citizens whom the American government was holding, pending their deportation under pre-existing law.

ASHCROFT: Senator, we will be happy on the language here if it's unclear, or if we are mistaken. Our intention is to be able to detain individuals who are the subject of deportation proceedings on other grounds to detain them as if they were the subject of deportation proceedings on terrorism grounds, which the law provides clearly is a mandatory detention.

SPECTER: Well, I think the law now gives you authority to detain if you're proceeding to deport. But on this phase, it goes

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evidence."

*House Judiciary Comm. Hearing, supra* note 59 (emphasis added).

61. *Sept. 25 Senate Judiciary Comm. Hearing, supra* note 55 (statements of Sens. Kennedy and Specter). *See generally* Jeffrey Toobin, *Ashcroft's Ascent*, THE NEW YORKER, Apr. 15, 2002, at 50.

62. Attorney General Ashcroft said,

When a person is being the subject of adjudication for being deported on grounds that are other than terrorism grounds, frequently that individual is not detained. The provision that we have in this proposal is that if the attorney general determines that the individual meets a standard of being a threat to national security, et cetera, *when that person during the pendency of the adjudication of deportation - being deported on other grounds - that person can be held in custody*, and that's the nature of this provision.

*Sept. 25 Senate Judiciary Comm. Hearing, supra* note 55 (emphasis added).

63. Senator Specter said,

[As] to the mandatory detention of suspected terrorists, § 202 gives broader powers than just having mandatory detention of someone thought to be a terrorist who is being held for deportation on some other lines. [It] defines detention of terrorists, aliens, and authorizes the attorney general to certify that an alien may be detained who he, quote, 'has reason to believe may commit further or facilitate acts described in Sections . . . .' [A] number of sections are listed and they all relate to terrorism. So that on the face of this statute it appears that the authority to detain on that very generalized standard, without any evidentiary base or probable cause, would be beyond somebody who is subject to deportation on other grounds.

*Id.*

well beyond that just on those where you have some rather vague . . .

ASHCROFT: Well, this is a concern expressed by Senator Kennedy and, obviously, we need to clarify this because there is no – we don't want to have some thing which has an effect which we don't intend.<sup>64</sup>

Nevertheless, in subsequent negotiations with Senator Patrick Leahy (D-Vt.), Chair of the Senate Judiciary Committee, the Department of Justice offered to change section 202's threshold standard from "reason to believe" to "reasonable grounds to believe" that the targeted individual would commit or aid acts of terrorism.<sup>65</sup> The Justice Department expected this "subtle modification . . . to satisfy lawmakers' desire for a higher threshold of evidence,"<sup>66</sup> even though the alteration did not confirm Attorney General Ashcroft's promise at the Senate Judiciary Committee hearing that the provision would be circumscribed to reach only those non-citizens who were subject to ongoing deportation proceedings while the same were pending.<sup>67</sup>

Senator Leahy, however, held the Bush Administration to the promise extracted by Senators Kennedy and Specter from Attorney General Ashcroft.<sup>68</sup> On October 11, 2001, the upper chamber passed Senate Bill 1510, which authorized the Attorney General to detain a non-citizen suspected of terrorist activity but also imposed the following restriction on the official's authority:

(5) COMMENCEMENT OF PROCEEDINGS. – The Attorney General shall place an alien detained under paragraph (1) in removal proceedings, or shall charge the alien with a criminal offense, not later than 7 days after the commencement of such detention. If the requirement of the preceding sentence is not satisfied, *the Attorney General shall release the alien.*<sup>69</sup>

Senator Leahy emphasized that, under the legislation adopted by the Senate, "if an alien is found not to be removable, he must be released from custody."<sup>70</sup> Senate Bill 1510 also expressly provided for

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64. *Id.* (statements of Sen. Specter and Attorney General Ashcroft).

65. Lancaster, *supra* note 52, at A6.

66. *Id.* See also *Winging it at Guantanamo*, *supra* note 15; *American Values on Trial*, *supra* note 51.

67. See *supra* text accompanying note 64. See generally Koh, *supra* note 55, at 34-36.

68. Lancaster, *supra* note 52, at A6. See also 147 CONG. REC. S10558 (daily ed. Oct. 11, 2001) (statement of Sen. Leahy recounting his office's negotiations with the Administration on proposed sections 202 and 203).

69. S.1510, 107th Cong. § 412 (2001), reprinted at 147 CONG. REC. S10621.

70. 147 CONG. REC. S10558 (statement of Sen. Leahy).

federal judicial review, through habeas corpus proceedings, of “any action or decision relating to this section[,] including judicial review of the merits of” the Attorney General’s certification that the legal officer had reasonable grounds to believe the non-citizen was a terrorist or otherwise presented a national security threat.<sup>71</sup> The full Congress imposed the above-described, significant limitations on the detainment authority granted to the Attorney General and inserted those restrictions without substantive change in section 412 of the USA PATRIOT ACT, which President Bush signed into law on October 26, 2001.<sup>72</sup>

In summary, during the immediate aftermath of the September 11 attacks, the Bush Administration requested legislation that would have authorized the Attorney General to certify for indefinite detention any non-citizen, legal or illegal, whom the official suspected of being a terrorist or otherwise a national security threat, subject only to “ministerial” judicial review.<sup>73</sup> Senior members of both major political parties in each house of Congress encountered extreme political pressure to acquiesce in this request and risked political repercussions in implementing what lawmakers perceived as their duty under the Constitution to keep the inexorable post-September 11 expansion of presidential police powers within constitutional limits. The Bush Administration, however, did not long honor this expression of legislative will. As we detail below, less than three weeks after the chief executive signed the USA PATRIOT ACT into law, President Bush issued his order on military tribunals, which accorded the Executive Branch not only the authority that Congress had specifically rejected but also additional powers that the administration had neglected even to seek.

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71. *Id.* (“subjecting Attorney General’s certification [to] judicial review”).

72. Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT) Act of 2001, Pub. L. No. 107-56, § 412(a), 115 Stat. 272, 351 (2001) [hereinafter § 412 of the Patriot Act]. It also changed the Administration proposal, which would have required all habeas corpus petitions to be filed in the District of Columbia federal courts. *See supra* note 56 and accompanying text. Section 412 permits original petitions to be filed in any U.S. district court otherwise having jurisdiction, satisfying Administration concerns about conflicting authority in different federal circuits with the less onerous stricture that all *appeals* be heard by the D.C. Circuit, and provides that Supreme Court and D.C. Circuit rulings would supply the “rule of decision” in all cases. § 412, 115 Stat. at 352. *See generally* Koh, *supra* note 55, at 34.

73. *Supra* note 60. *See also* *Winging it at Guantanamo*, *supra* note 15; *American Values on Trial*, *supra* note 51.

## B. The Bush Order and Department of Defense Implementing Regulations

Senators and representatives denied the request lodged by Attorney General Ashcroft, the nation's highest-ranking legal officer, for authority to detain indefinitely any non-citizen whom the official suspected of terrorism.<sup>74</sup> This explicit legislative rejection proved to be a mere temporary setback for the Bush Administration, because section 3 of the November 13, 2001 Executive Order granted the Secretary of Defense precisely the same power.

Section 3 authorizes and directs the Secretary of Defense to take into custody and "detain[] at an appropriate location . . . outside or within the United States" all "individual[s] subject to" the Order. Section 2 of the Order defines "individual subject to this order" to mean "any individual who is not a United States citizen with respect to whom [the President] determine[s] from time to time in writing that there is reason to believe that such individual" is an international terrorist dangerous to the United States or is a person who "has knowingly harbored one or more" such people.<sup>75</sup> Thus, the Order grants to the Defense Department all of the power that the Administration had previously but unsuccessfully sought from Congress.

Indeed, the authority claimed by the Bush Order is significantly broader than even that power the Administration had requested from legislators. The most aggressive position the Administration assumed before Congress was that federal habeas corpus review of detentions should be limited to the federal courts in the District of Columbia.<sup>76</sup> The Bush directive, however, would purportedly dispense altogether with any judicial review sought by or on behalf of "any individual

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74. See *supra* text accompanying notes 68-72 (discussing legislative history of § 412 of the USA PATRIOT ACT).

75. Bush Order, *supra* note 3, at § 2. This section also limits the Order's scope to persons whom the President deems "it is in the interest of the United States [] be subject to this order." *Id.* Though this limitation grants the President discretion not to subject an otherwise implicated individual to the Order's terms, because that discretion is unbridled it does not restrain executive branch power to employ the Order's provisions against anyone deemed by the President to be an international terrorist or one who aids or abets such conduct.

76. See *supra* note 56. See also *supra* note 72 (showing Congress rejected idea and treated fears about conflicting authority of Administration with less onerous habeas corpus venue provision); Curtis A. Bradley & Jack L. Goldsmith, *The Constitutional Validity of Military Commissions*, 5 GREEN BAG 2D 249, 252-54 (2002) (assessing the constitutional authority for the Bush Order); Molly McDonough, *Tribunals vs. Trials*, 88 A.B.A. J., Jan. 2002, at 20.

subject to [the] order.”<sup>77</sup>

The plain meaning of section 7(b) has received subsequent confirmation in the United States Department of Defense Military Order Number One (“DOD Order”), promulgated on March 21, 2002, which establishes the procedures for, and the membership of, military commissions authorized by the Bush Order and otherwise implements this directive.<sup>78</sup> The DOD Order strictly forbids federal judicial review of any aspects of any proceeding undertaken pursuant to the Bush Order. The DOD Order provides, in pertinent part, for review of the record compiled in the trial before a military commission by a panel comprised of three military officers “at least one of which [sic] . . . shall have experience as a judge.”<sup>79</sup> The DOD Order instructs the tribunal so constituted to “disregard any variance from procedures specified in this Order or elsewhere that would not materially have affected the outcome of the trial before the Commission.”<sup>80</sup> Moreover, the review panel cannot “return the case . . . for further proceedings,” unless “a majority of the [members] has formed a definite and firm conviction that a material error of law has occurred.”<sup>81</sup> Otherwise, the panel forwards the matter to the Secretary of Defense, who may return the case for additional proceedings, forward the matter to the president with a recommendation regarding disposition, or make the final determination respecting the charge as well as the sentence, if authorized by the chief executive to do so.<sup>82</sup> Should lingering doubt remain that the Bush and DOD Orders preclude all further review - including presumably any intervention by a federal court that is exercising habeas corpus jurisdiction - section 6(H)(2) of the DOD Order expressly provides,

[A] Commission finding as to a charge and any sentence of a

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77. Bush Order, *supra* note 3, § 7(b). See also *Winging it at Guantanamo*, *supra* note 15.

78. DOD Order, *supra* note 3. See also Jordan J. Paust, *Antiterrorism Military Commissions: The Ad Hoc DOD Rules of Procedure*, 23 MICH. J. INT’L L. 677 (2002); John Mintz, *U.S. Adds Legal Rights in Tribunals*, WASH. POST, Mar. 21, 2002, at A1; Deborah L. Rhode, *Terrorists and Their Lawyers*, N.Y. TIMES, Apr. 16, 2002, at A27.

79. DOD Order, *supra* note 3, § 6(H)(4). See also Richard A. Serrano, *U.S. Readies Plans for Terror Tribunals*, L.A. TIMES, Mar. 21, 2002, at A1; *Are Tribunal Rules Fair?*, WASH. POST, Mar. 25, 2002, at A18.

80. DOD Order, *supra* note 3, § 6(H)(4); see generally Margaret Graham Tebo, *ABA Decries Detainee Handling*, 88 A.B.A. J., Jan. 2002, at 21; John Mintz, *Tribunal Rules Aim to Shield Witnesses*, WASH. POST, Mar. 22, 2002, at A1.

81. DOD Order, *supra* note 3, § 6(H)(4); see generally Mintz, *supra* note 78; Serrano, *supra* note 79.

82. DOD Order, *supra* note 3, § 6(H)(5); see generally Mintz, *supra* note 80.

Commission becomes final when the President or, if designated by the President, the Secretary of Defense makes a final decision thereon . . . . Any sentence made final by action of the President or the Secretary of Defense shall be carried out promptly.<sup>83</sup>

Furthermore, the intent of the Bush Administration to preclude relief by federal habeas corpus does not cover only those ultimately tried and convicted by military commissions. In official statements made contemporaneously with the publication of the DOD Order, Defense Department officers observed that “[t]he vast *majority* of captives . . . will be released if they are found innocent, sent to their home countries for trial or *detained indefinitely without charges if the United States considers them too dangerous to release but lacks enough evidence to prosecute them.*”<sup>84</sup> These comments, together with section 6(H) of the DOD Order and section 7(b) of the Bush Order, suggest the Bush Administration’s intent to maintain custody of suspected terrorists substantially beyond the terms of that authority which lawmakers granted in the USA PATRIOT ACT.<sup>85</sup>

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83. DOD Order, *supra* note 3, § 6(H)(2). See also Mintz, *supra* note 78; Serrano, *supra* note 79.

84. See Mintz, *supra* note 80 (emphasis added). See also Rhode, *supra* note 78; Serrano, *supra* note 79.

85. Given the Order’s express and implied prohibitions on federal court review, we find inadequate White House Counsel Alberto R. Gonzales’ claim that “judicial review in civilian court,” is preserved under the Bush Order: “anyone arrested, detained or tried in the United States by a military commission will be able to challenge the lawfulness of the commission’s jurisdiction through a habeas corpus proceeding in a federal court.” Alberto R. Gonzales, *Martial Justice, Full and Fair*, N.Y. TIMES, Nov. 30, 2001, at A27. This otherwise promising concession does not offset the many indications that certification under Bush’s Order precludes federal court review of detention, imprisonment, or imposition of other punishment, including death, authorized by the Order.

First, Gonzales sharply restricted his promise of “judicial review in [the] civilian courts” to those “arrested, detained or tried in the United States” (query if Guantanamo Bay, Cuba is “in the U.S.”). *Id.* Even then, a federal habeas corpus proceeding would only treat challenges to the “lawfulness of [a military] commission’s *jurisdiction.*” *Id.* (emphasis added). Depending on the Administration view of the legal term “jurisdiction,” it may well argue a federal habeas court would be limited to the ministerial task of confirming the President had in fact found in writing a detainee “subject to” his Order. Bush Order, *supra* note 3, § 2; cf. *House Judiciary Comm. Hearing*, *supra* note 59 (statement of Rep. Nadler) (voicing concern that judicial review of detentions under Administration’s proposed anti-terrorism bill would be “only ministerial”). Second, Gonzales justified his informal view by citation to the Supreme Court case of *Ex Parte Quirin*, 317 U.S. 1 (1942), which reviewed challenges to President Roosevelt’s World War II order authorizing trial of alleged Nazi saboteurs before military tribunals, not by the Bush Order’s text which seems to preclude any judicial review. Gonzales, *supra*. But the Court reached the merits in *Quirin* only after the Justice Department elected “not to contest the Supreme Court’s jurisdiction.” Cutler, *supra* note 19. However, the Bush Administration might well con-

### C. Congressional Reactions

Two days after the President issued the executive order authorizing indefinite detainment and trial by military tribunals, Senator Specter, a senior Republican, and longtime, active member of the Senate Judiciary Committee, voiced concerns on the Senate floor that the Chief Executive's directive exceeded his constitutional power.<sup>86</sup> Senator Specter insisted that "under the Constitution it is the Congress that has the authority to establish the parameters and the proceedings under [military] courts."<sup>87</sup> Accordingly, he called for the Senate Judiciary Committee to hold hearings that would inquire into the constitutional and prudential issues raised by the Bush Order.<sup>88</sup> A rare colloquy next ensued between Senator Specter and Senate Judiciary Chair Leahy, who publicly thanked the senator from Pennsylvania on the chamber floor for raising questions related to the Bush Order and promised that he would convene a committee hearing on the matter during the period which immediately followed the then-impending Thanksgiving recess.<sup>89</sup>

In fact, over a two-week time frame spanning late November and early December 2001, the Senate Judiciary Committee conducted three days of hearings on the Bush Order and received testimony from eighteen witnesses.<sup>90</sup> A broad spectrum of public officials and constitutional scholars, who hold quite diverse political perspectives,

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test jurisdiction, relying on the Bush and DOD Orders' plain terms and, thus, force the courts to address the constitutional issues the Court avoided in 1942. *See supra* note 19. Finally, even if contrary to these reservations, Gonzales had clearly construed the Bush Order as affirmatively protecting adequate judicial review through habeas corpus proceedings, this view might not be the final word. Without questioning his integrity or good faith or those of other Bush staff, White House Counsel's newspaper opinion piece does not preclude the Administration from asserting in later litigation contrary views on the meaning of the Bush and DOD Orders, especially were they are closer to the Orders' texts. We urge President Bush to acquiesce in searching federal court review of actions under his Orders but Gonzales's article does not irrevocably commit the President to this position. *See infra* text accompanying note 292-93.

86. *See* 147 CONG. REC. S11888-890 (daily ed. Nov. 15, 2001) (statement of Sen. Specter).

87. *Id.* at S11888. *See generally* *Winging it at Guantanamo*, *supra* note 15; *American Values on Trial*, *supra* note 51.

88. 147 CONG. REC. at S11888; *see also* McDonough, *supra* note 76; Neil A. Lewis, *U.S. Seeking Basis to Charge War Detainees*, N.Y. TIMES, Apr. 21, 2002, at A1; *Winging it at Guantanamo*, *supra* note 15.

89. 147 CONG. REC. at S11888-89 (statement of Sen. Leahy).

90. 147 CONG. REC. S13275-77 (daily ed. Dec. 14, 2001) (statement of Sen. Leahy) (reviewing the hearings related to the Bush Order conducted by the Senate Judiciary Committee).



testified during those sessions. Some witnesses, such as representatives of the current administration and individuals who served in several prior ones, argued that the President's power as "Commander-in-Chief"<sup>91</sup> of the United States armed forces encompassed the authority to promulgate the Executive Order,<sup>92</sup> although no one who offered testimony addressed the precise issue which we examine: presidential power unilaterally to preclude the exercise of federal court jurisdiction created by pre-existing statute. However, additional witnesses, namely certain of the nation's most distinguished authorities on the Constitution, expressed grave reservations regarding the Order's validity, because the directive invaded the province of Congress<sup>93</sup> or potentially infringed individual rights that the Bill of Rights affirmatively guarantees.<sup>94</sup>

This testimony, and subsequent developments, including the Bush Administration's rejection of legislative "requests . . . to review and be consulted about the draft [DOD] regulations,"<sup>95</sup> which implement the Bush Order, as well as the American Bar Association's publication of recommendations for congressional action responsive to the directive, prompted action by Senator Leahy.<sup>96</sup> Exactly three months after the President issued the Order, Chair Leahy introduced a bill that "would provide the executive branch with the specific authorization it now lacks to use extraordinary tribunals to try members of the al Qaeda terrorist network and those who cooperated with them."<sup>97</sup> Senator Leahy, who relied in part on testimony presented at the Judiciary Committee hearings held during late 2001, declared his view that President Bush lacked the constitutional power to create

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91. U.S. CONST. art. II, § 2, cl. 1. See also *infra* notes 134-36, 191, 287 and accompanying text.

92. See, e.g., *DOJ Oversight: Preserving Our Freedoms While Defending Against Terrorism: Hearing Before Senate Comm. on Judiciary*, 107th Cong. (Dec. 6, 2001) (statement of Attorney General Ashcroft) ("The president has ordered - and it is a military order, to the [DOD - it's part] of his responsibility as commander in chief of a nation in conflict [that the DOD] develop a framework that would provide full and fair proceedings.").

93. See 147 CONG. REC. S13277 (daily ed. Dec. 14, 2001) (statement of Sen. Leahy) (summarizing testimony of a number of legal experts who found that the Bush Order invaded the powers of Congress).

94. See, e.g., *DOJ Oversight: Preserving Our Freedoms While Defending Against Terrorism: Hearing Before the Senate Comm. on the Judiciary*, 107th Cong. (Nov. 28, 2001), at [www.senate.gov/judiciary](http://www.senate.gov/judiciary) (testimony of Neal Katyal stating how the Bush Order would violate protections in the Bill of Rights).

95. 148 CONG. REC. S742 (daily ed. Feb. 13, 2002) (statement of Sen. Leahy).

96. See *id.*; ABA REPORT & RECOMMENDATIONS, *supra* note 14.

97. 148 CONG. REC. S741 (daily ed. Feb. 13, 2002) (statement of Sen. Leahy).

special military tribunals unilaterally:

The Attorney General testified at our hearing on December 6 that the President does not need the sanction of Congress to convene military commission[s], but I disagree. Military tribunals may be appropriate under certain circumstances, *but only if they are backed by specific congressional authorization.*<sup>98</sup>

Senator Leahy's proposed legislation would circumscribe military detainment and military trials much more narrowly, and impose considerably greater procedural safeguards, than did the Bush Order. First, the bill exempts from military trial or detainment "individuals arrested while in the United States, since our civilian court system is well-equipped to handle such cases."<sup>99</sup> Indeed, Leahy's recommended statute would expressly shelter from detainment and military trial not only American citizens but also all "alien[s] lawfully admitted for permanent residence."<sup>100</sup> Moreover, the bill would authorize military detainment and trial of only those persons "apprehended in Afghanistan, fleeing from Afghanistan, or in or fleeing from any other place outside the United States where there is armed conflict involving the Armed Forces of the United States."<sup>101</sup>

In addition to imposing these limitations on the scope of executive branch authority to detain persons and try them in military commissions, Senator Leahy's proposal would provide individuals who are subject to these extraordinary powers significant procedural protections which neither the Bush Order nor the subsequent DOD Order implementing the directive affords.<sup>102</sup> Most relevant to the issues that we consider are the Leahy bill's provisions which subject detentions under its authority to the supervision of the United States Court of Appeals for the District of Columbia Circuit.<sup>103</sup> The suggested measure would similarly provide for appellate review of military tribunals' judgments in the United States Court of Appeals for the Armed Forces - an all-civilian court comprised of judges whom the

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98. *Id.* (emphasis added). See also Lewis, *supra* note 88; *Winging it at Guantanamo*, *supra* note 15.

99. 148 CONG. REC. at S742. See also Military Tribunal Authorization Act of 2002, S.1941, 107th Cong. § 3 (2002). On March 20, 2002, House members introduced an identical bill. See H.R. 4035, 107th Cong. (2002).

100. 148 CONG. REC. S744 (reprinting section-by-section analysis of S.1941).

101. S. 1941, § 3(a)(3). See generally *U.S. Adds Legal Rights in Tribunals*, *supra* note 79; *American Values on Trial*, *supra* note 51.

102. See S.1941, §§ 4 & 5. See also Lewis, *supra* note 88; Rhode, *supra* note 78.

103. See S.1941, § 5(d). See generally 28 U.S.C. § 41 (1994); CHRISTOPHER BANKS, *JUDICIAL POLITICS IN THE D.C. CIRCUIT COURT* (1999); JEFFREY MORRIS, *CALMLY TO POISE THE SCALES OF JUSTICE* (2001).

president appoints, with Senate advice and consent, to fifteen-year terms - as well as further review in the United States Supreme Court through writ of certiorari.<sup>104</sup> The bill introduced by Senator Leahy was referred to the Senate Armed Services Committee which has thus far taken no further action on the measure.<sup>105</sup>

In sum, President George W. Bush premised on two principal sources the November 13, 2001 Executive Order, which would mandate that military commissions try certain individuals whom the government prosecutes for violating the laws of war and additional applicable laws and which would concomitantly deprive these defendants of federal court access and the federal judiciary of jurisdiction. Bush relied on the power vested in him as the president and as the commander-in-chief of the United States armed forces by the Constitution and federal statutes, particularly the congressional joint resolution that authorized deployment of military force.

Major leaders from both political parties in each chamber, nonetheless, voiced serious concerns about whether the Bush Order was constitutional, which concomitantly prompted a series of oversight hearings and ultimately led to the introduction of proposed legislation. The Senate bill would not only substantially circumscribe the power asserted by President Bush but also explicitly preserve a role for federal courts in reviewing the Administration's actions. These expressions of congressional disapproval, especially combined with lawmakers' refusal to grant prior Administration requests for even a portion of the expansive authority claimed in the Bush Order, demonstrate that the directive's purported abrogation of federal court jurisdiction clearly conflicts with legislative will.

In analyzing the Bush Order's attempted abolition of judicial jurisdiction, it is important to understand that the specific terminology used by the Founders when they crafted the Constitution, relevant history of the basic document, and controlling Supreme Court case law demonstrate the Constitution endows Congress with virtually complete power to establish the federal courts and prescribe their jurisdiction. President Truman's assertion of constitutional authority for seizing the steel mills during 1952 and the High Court determination in *Youngstown* that the chief executive lacked the requisite

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104. S.1941, § 4(e)(2) & (3). See generally 10 U.S.C §§ 867, 942 (1994); Pub. L. No. 103-337, 108 Stat. 2663 (1994); *Ryder v. U.S.*, 515 U.S. 177 (1995); *TRIBE*, *supra* note 7, at 298-99.

105. 148 CONG. REC. S741 (noting bill's referral to Senate Committee on Armed Services).

power comprise the most directly applicable precedent. Thus, we comprehensively scrutinize *Youngstown* below.

### III. A “Police Action” in Korea, the Steel Seizure Order, and the *Youngstown* Opinion

In this section of the article, we explore numerous relevant developments which transpired fifty years ago. The segment initially examines requests that several presidential administrations lodged for legislative authorization to employ governmental seizure as a mechanism which would treat conflicts between labor and management, while the part discusses how senators and representatives addressed overtures from various chief executives. We then describe President Truman’s steel seizure initiative, emphasizing the power that his Executive Order claimed for this action. The portion next analyzes the Supreme Court decision in *Youngstown*, which held the Truman Order unconstitutional. The section concludes with a brief assessment of the meaning attributed to the pathbreaking opinion over the subsequent half century.

#### A. Administration Requests for Legislative Authorization and Congressional Responses

Justice Hugo Black, writing for the majority in the *Youngstown* case, found “there is no statute that expressly authorizes the President to take possession of property as he did here [and no legislation] from which such a power can fairly be implied.”<sup>106</sup> Moreover, when the members of Congress were evaluating possible adoption of the Labor Management Relations, or Taft-Hartley, Act of 1947, lawmakers explicitly rejected a proposed amendment in the measure that would have authorized the chief executive to use seizure as a device which would resolve labor disputes in national emergencies.<sup>107</sup>

Justice Felix Frankfurter authored a concurring opinion that elaborated on the somewhat laconic exposition in the majority decision which Justice Black penned.<sup>108</sup> Frankfurter traced in consum-

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106. See *Youngstown*, 343 U.S. at 585 (1952). See also *infra* notes 129-130 and accompanying text. See generally MARCUS, *supra* note 2, at 1-57; WESTIN, *supra* note 2, at 2-6.

107. See *Youngstown*, 343 U.S. at 586. See also *infra* notes 131-32 and accompanying text. See generally MARCUS, *supra* note 2, at 162-64: The Labor Management Relations and Taft-Hartley Acts are identical.

108. *Youngstown*, 343 U.S. at 593 (Frankfurter, J., concurring). See also MARCUS, *supra* note 2, at 203.

mate detail back to Woodrow Wilson's presidency the sixteen prior circumstances when Congress had clearly provided for the "seizure of production, transportation, communications, or storage facilities" by a significant number of earlier administrations.<sup>109</sup> The jurist correspondingly determined that senators and representatives deemed this tool's invocation so radical as to circumscribe sharply its executive branch deployment.<sup>110</sup> Frankfurter then thoroughly documented legislative consideration of the Labor Management Relations Act in 1947, which the Justice characterized as the most recent, applicable congressional activity, while the jurist ascertained that lawmakers had in effect "said to the President: '[y]ou may not seize. Please report to us and ask for seizure power if you think it is needed in a specific situation.'"<sup>111</sup>

### B. President Truman's Steel Seizure Order

In mid-1950, the United States entered the conflict between North and South Korea, although Congress never issued a formal declaration of war.<sup>112</sup> During late 1951, the United Steelworkers of America and the principal domestic steel manufacturers became embroiled in a contentious dispute over applicable terms and conditions of workers' employment. When protracted negotiations between labor and management, the conclusion of which the federal government had attempted to facilitate, yielded no satisfactory resolution, the steelworkers' union announced that it would sponsor a nationwide strike which was scheduled to commence on April 9, 1952. Because steel was an indispensable constituent for most war material, the Truman Administration feared that a work stoppage would seriously disrupt United States military participation in the Korean conflict. President Truman, therefore, promulgated an April 8 Executive Order which instructed the Secretary of Commerce, John Sawyer, to seize American steel mills and operate the entities on the country's behalf.<sup>113</sup> The Chief Executive premised that order on the authority

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109. *Youngstown*, 343 U.S. at 597-98. See also *infra* notes 121-23, 146 and accompanying text.

110. *Youngstown*, 343 U.S. at 598. See also *infra* notes 154-55 and accompanying text.

111. *Youngstown*, 343 U.S. at 603. See also *infra* notes 156-57 and accompanying text.

112. We rely substantially in this subpart on Justice Black's opinion for the Court in *Youngstown*; HAROLD HONGJU KOH, *THE NATIONAL SECURITY CONSTITUTION* 105-07 (1990); MARCUS, *supra* note 2; MCCONNELL, *supra* note 2, at 2-29; WESTIN, *supra* note 2; see also U.S. CONST. art.1, § 8, cl. 11.

113. See *supra* notes 1-2 and accompanying text. See also MARCUS, *supra* note 2, at 58-82; MCCONNELL, *supra* note 2, at 29-36; WESTIN, *supra* note 2, at 7-16. See generally

vested in him by the Constitution and the laws of the United States and as president and commander-in-chief of American armed forces. Commerce Secretary Sawyer concomitantly issued several orders which requested that the presidents of the seized steel corporations serve as those companies' operating managers for the nation.<sup>114</sup> The following day, Truman transmitted to Congress a report on his administration's activities and twelve days thereafter he delivered senators and representatives another message; both of these missives effectively encouraged lawmakers to pass legislation, even intimating that members of Congress might reject the course of action which the President had selected.<sup>115</sup> However, lawmakers did not respond to the Chief Executive's importuning.<sup>116</sup>

### C. The *Youngstown* Opinion

#### 1. Overview of the Litigation

The country's steel producers complied under protest with the orders promulgated by President Truman and Commerce Secretary Sawyer and immediately instituted litigation in the United States District Court for the District of Columbia. The manufacturers alleged that neither the United States Constitution nor federal legislation empowered the Truman Administration to seize American steel companies, and the corporations sought a declaration invalidating the presidential and secretarial directives.<sup>117</sup> United States District Judge Alexander Holtzhoff first denied the plaintiffs' request for a temporary restraining order on April 9.<sup>118</sup> Nevertheless, United States Dis-

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*Youngstown*, 343 U.S. at 582-83.

114. *Youngstown*, 343 U.S. at 583. See generally CHARLES SAWYER, CONCERNS OF A CONSERVATIVE DEMOCRAT (1968); Robert F. Banks, *Steel, Sawyer, and the Executive Power*, 14 U. PITT. L. REV. 467 (1953).

115. See Message from President Harry S. Truman to Congress, 98 CONG. REC. H3962 (daily ed. Apr. 9, 1952); Message from President Harry S. Truman to Congress, 98 CONG. REC. H4192 (daily ed. Apr. 21, 1952). See also MARCUS, *supra* note 2, at 94; *Youngstown*, 343 U.S. at 583. See generally *infra* note 225.

116. *Youngstown*, 343 U.S. at 583. See also MARCUS, *supra* note 2, at 95-101. See generally Charles L. Black, Jr., *Some Thoughts on the Veto*, 40 LAW & CONTEMP. PROBS. 87, 98-99 (Spr. 1976).

117. *Youngstown*, 343 U.S. at 583. See generally MARCUS, *supra* note 2, at 102-03; MCCONNELL, *supra* note 2, at 38; REHNQUIST, *supra* note 2, at 155; WESTIN, *supra* note 2, at 26-36.

118. *Youngstown Sheet & Tube Co. v. Sawyer*, 103 F. Supp. 978, 981 (D.D.C. 1952). See also MARCUS, *supra* note 2, at 103-08; REHNQUIST, *supra* note 2, at 155-58; WESTIN, *supra* note 2, at 34-43.

trict Judge David A. Pine ultimately granted a preliminary injunction which restrained the Commerce Secretary from continuing to seize and possess the steel mills on April 29.<sup>119</sup> The United States Court of Appeals for the District of Columbia Circuit stayed Judge Pine's order the same day.<sup>120</sup> The Supreme Court deemed best the expeditious resolution of the case, while the Justices granted certiorari on May 3 before the appellate court issued a final judgment, set the matter for argument nine days thereafter, and issued the High Court's opinion on June 2.<sup>121</sup>

Justice Black, writing for the majority, affirmed the district court's decision.<sup>122</sup> Justice Frankfurter observed that he joined the Black opinion because Frankfurter agreed with the separation of powers analysis undertaken by his colleague; however, Frankfurter trenchantly admonished that the application of the principle appeared substantially more complex and flexible than may have seemed at first glance from the determination which Black authored.<sup>123</sup> Frankfurter correspondingly remarked that, although diverse perceptions related to separation of powers might have merely reflected, "differences in emphasis and nuance, they [could] hardly be" captured by a single opinion and, therefore, necessitated the "individual expression of views in reaching a common result."<sup>124</sup> All four Supreme Court Justices - Frankfurter, Robert Jackson, William O. Douglas, and Harold Burton - who joined with Black penned separate decisions, while Justice Tom Clark concurred in the judgment but not in Black's opinion.<sup>125</sup> Chief Justice Fred Vinson wrote a dissent that Justice

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119. *Youngstown Sheet & Tube Co. v. Sawyer*, 103 F. Supp. 577 (D.D.C. 1952). See also MARCUS, *supra* note 2, at 108-129; MCCONNELL, *supra* note 2, at 36-41; REHNQUIST, *supra* note 2, at 158-168; WESTIN, *supra* note 2, at 51-72. See generally *Youngstown*, 343 U.S. at 584.

120. See *Sawyer v. United States Steel Co.*, 197 F.2d 582 (D.C. Cir. 1952). See generally *Youngstown*, 343 U.S. at 584; MARCUS, *supra* note 2, at 130-148; MCCONNELL, *supra* note 2, at 42-43; REHNQUIST, *supra* note 2, at 167-68; WESTIN, *supra* note 2, at 73-87.

121. *Youngstown*, 343 U.S. 579 (1952). See also MARCUS, *supra* note 2, at 147-49; MCCONNELL, *supra* note 2, at 44; REHNQUIST, *supra* note 2, at 167-68; WESTIN, *supra* note 2, at 88-95.

122. See *Youngstown*, 343 U.S. at 582. See generally *infra* notes 128-45 and accompanying text.

123. See *Youngstown*, 343 U.S. at 593 (Frankfurter, J., concurring). See also *infra* notes 128-145 and accompanying text. See generally *infra* notes 146-62, 174-88 and accompanying text.

124. See *Youngstown*, 343 U.S. at 589. See also *infra* note 146 and accompanying text.

125. *Youngstown*, 343 U.S. at 593 (Frankfurter, J., concurring); *id.* at 634 (Jackson, J., concurring); *id.* at 629 (Douglas, J., concurring); *id.* at 655 (Burton, J., concurring); *id.* at 660 (Clark, J., concurring in the judgment). See also *id.* at 582 (affording Justice Black's

Stanley Reed and Justice Sherman Minton joined.<sup>126</sup> Shortly after the High Court had issued its determination, the United Steelworkers of America conducted a strike lasting for 53 days, which had practically no discernable effect on United States military involvement in the Korean conflict, because a steel shortage failed to materialize while the labor union and the manufacturers ultimately settled their differences.<sup>127</sup>

## 2. *The Majority Opinion in Youngstown*

Justice Black declared that presidential authority, if any relevant power existed, to issue the order must be prescribed in a federal statute or in the United States Constitution.<sup>128</sup> The jurist could discover neither legislation expressly authorizing the chief executive to seize private property nor congressional enactments from which such a prerogative might fairly be implied.<sup>129</sup> Black specifically observed that no statute in explicit words permitted reliance on the seizure procedure as a means for addressing disputes over employment conditions between labor and management, while senators and representatives had clearly refused to approve the particular approach for resolving these controversies.<sup>130</sup> When lawmakers considered passage of the Labor Management Relations Act in 1947, the legislative branch rejected a recommended amendment in the statute which would have empowered the federal government to seize various industrial processes during national emergencies.<sup>131</sup> “Consequently, the plan Congress adopted in the Act did not provide for seizure under any circumstances.”<sup>132</sup>

If President Truman possessed the requisite authority to promulgate the order seizing the country’s steel mills, the Constitution must give the officer this power. The United States government, when de-

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opinion); *infra* notes 146-213 and accompanying text.

126. See *Youngstown*, 343 U.S. at 667 (Vinson, C. J., dissenting).

127. See MARCUS, *supra* note 2, at 249-260; MCCONNELL, *supra* note 2, at 47-53; WESTIN, *supra* note 2, at 170-71. See also REHNQUIST, *supra* note 2, at 189-92.

128. *Youngstown*, 343 U.S. at 585. See also *infra* note 210 and accompanying text. See generally JOHN FRANK, MR. JUSTICE BLACK: THE MAN AND HIS OPINIONS (1949); ROGER K. NEWMAN, HUGO BLACK (1994).

129. *Youngstown*, 343 U.S. at 585. See also *supra* note 106 and accompanying text.

130. *Youngstown*, 343 U.S. at 585-86. See also *supra* note 106, *infra* notes 154-55 and accompanying text.

131. *Youngstown*, 343 U.S. at 586 (citation omitted). See also *supra* notes 106, 110 and accompanying text; *infra* note 156 and accompanying text.

132. *Youngstown*, 343 U.S. at 586. See also *infra* note 157 and accompanying text.



fending the Truman Administration's issuance of the Executive Order, argued that the Supreme Court should infer presidential authority from the aggregate of those powers which the chief executive claimed under the essential document and did not pursue the contention that the president had depended upon an express grant of constitutional authority.<sup>133</sup>

Black then reviewed the various sources from which the power Truman asserted was said to emanate. The Justice first declared that the initiative could not be sustained by denominating it an exercise of the president's military authority as commander-in-chief of American armed forces.<sup>134</sup> Black rejected governmental reliance on numerous cases, which accorded military leaders with responsibility for daily combat in a war theater broad powers to seize private property and prevent labor disputes from disrupting industrial production.<sup>135</sup> He characterized Truman's seizure effort as a "job for the Nation's law-makers, not for its military authorities."<sup>136</sup>

The jurist next determined that the Executive Order which the administration had adopted would receive no support from the several constitutional provisions that bestowed executive power on the president. The document's framework, which grants the official authority for taking care that the "laws are faithfully executed refutes" the notion of the president as lawmaker, while this structure limits the chief executive's functions in the legislative process to recommending statutory proposals which the officer considers advisable and vetoing measures the official deems inappropriate.<sup>137</sup> Moreover, Black found the Constitution clear and unequivocal that Congress "shall make the laws which the President is to execute," and the Justice quoted extensively from the provision in Article I that "all legislative Powers be vested in a Congress [authorized to] make all Laws which shall be necessary and proper for carrying into Execution" the

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133. *Youngstown*, 343 U.S. at 587. See also *infra* notes 158-60, 195-98 and accompanying text.

134. *Youngstown*, 343 U.S. at 587. See also *infra* notes 141, 191-92 and accompanying text.

135. *Youngstown*, 343 U.S. at 587. He found theater of war an expanding concept but could not hold constitutional the president's executive order. *Id.* See also *infra* note 191 and accompanying text.

136. *Youngstown*, 343 U.S. at 587. See also *infra* notes 141, 192 and accompanying text.

137. *Youngstown*, 343 U.S. at 587. See generally U.S. CONST. art. II, § 3; NOWAK & ROTUNDA; *supra* note 18, at 256; *infra* notes 190-94 and accompanying text.

enumerated powers and all others afforded the federal government.<sup>138</sup> The jurist described the Truman Administration directive as an enactment and carefully detailed how the order's preamble, like that in numerous statutes, propounded reasons why the president believed certain policies warranted adoption, while the directive proffered those "policies as rules of conduct to be followed" and instructed an executive branch officer to "promulgate additional rules and regulations consistent with the policy" proclaimed and necessary to its implementation.<sup>139</sup> Black also stated that Congress certainly could have approved the policies enunciated in the Truman Administration order through legislative authority to "take private property for public use" as well as to pass statutes, which govern employee-employer relationships, which prescribe rules to resolve labor-management disputes, and which fix working conditions and wages in particular segments of the nation's economy.<sup>140</sup> The jurist emphatically admonished that the "Constitution [did] not subject this law making power of Congress to presidential or military supervision or control."<sup>141</sup>

Black vociferously rejected appeals by the Truman Administration to previous practice of chief executives who, absent some authority which senators and representatives had granted, purportedly exercised presidential power and seized private business enterprises when settling employment controversies between labor and management.<sup>142</sup> Regardless of whether the government had accurately portrayed the relevant history, the Justice observed that Congress could not cede its "exclusive constitutional authority to make laws necessary and proper to carry out the powers," which the United States Constitution vested in the federal government.<sup>143</sup> Moreover, the jurist remarked that the Founders of the country entrusted Congress alone with legislative authority in both good and bad times,<sup>144</sup> while recounting the historical developments, the hopes for freedom and the fears of power which underlay the Framers' choices would only confirm the proposition that this seizure action must be invali-

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138. *Youngstown*, 343 U.S. at 587-88. See also U.S. CONST. art. I, §§ 1, 8, cl.18.

139. *Youngstown*, 343 U.S. at 588. He facetiously commented that the Truman Administration Executive Order "directs that a presidential policy be executed in a manner prescribed by the President." *Id.*

140. *Id.* See also U.S. CONST. art. I, § 8; *infra* note 193 and accompanying text.

141. *Youngstown*, 343 U.S. at 588. See also *infra* notes 191-92 and accompanying text.

142. *Youngstown*, 343 U.S. at 588. See also *infra* note 195 and accompanying text.

143. *Youngstown*, 343 U.S. at 588-89. See also U.S. CONST., art. I, § 8, cl. 18.

144. *Youngstown*, 343 U.S. at 589. See also *infra* note 202 and accompanying text.

dated.<sup>145</sup>

In short, Justice Black, writing for the Supreme Court majority, could discover no express or implicit statutory authority which might substantiate the Truman Administration's Executive Order seizing the steel companies. The jurist concomitantly ascertained that the United States Constitution did not accord the president explicit power to seize the corporations, while neither the official's authority as commander-in-chief of American armed forces nor the officer's executive power furnished implied support for the presidential initiative. Black also described seizure as lawmaking, which the Constitution bestows exclusively on Congress.

### 3. *The Concurring Opinions in Youngstown*

Justices Frankfurter, Jackson, Douglas and Burton all joined the opinion that Justice Black authored and, therefore, comprised a majority of the High Court, while Justice Clark concurred only in the judgment and wrote a separate decision. All four members who joined the opinion penned by Black authored their own concurrences. These Justices may have concurred for reasons similar to those which Justice Frankfurter so clearly espoused and which we examined above.<sup>146</sup>

#### a. Justice Frankfurter's Opinion

Justice Frankfurter prefaced his analysis with a disquisition on United States history, the tripartite branches of the federal government, and the judiciary's appropriate role and obligation when it adjudicates disputes about the meaning of the American Constitution.<sup>147</sup> Frankfurter characterized a constitutional democracy as an excep-

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145. *Youngstown*, 343 U.S. at 589. See also TRIBE, *supra* note 7, at 671-73 (criticizing Black's approach to Congress' silence); Joseph Grundfest & A. C. Pritchard, *Statutes With Multiple Personality Disorders*, 54 STAN. L. REV. 627 (2002); *infra* text accompanying notes 203-04, 210. See generally WILLIAM ESKRIDGE, *DYNAMIC STATUTORY INTERPRETATION* (1994) (assessing silence); ANTONIN SCALIA, *A MATTER OF INTERPRETATION* (1997).

146. The method in which Justice Black applied separation of powers led him to join the majority opinion, but he found the principle more complex and flexible than it seemed and stated that varying views might have suggested different emphasis and nuance which one decision could not capture, thus requiring individual articulation to reach a common result. *Youngstown*, 343 U.S. at 593 (Frankfurter, J., concurring). See also *supra* notes 122-23 and accompanying text.

147. *Youngstown*, 343 U.S. at 593. See also Neal K. Katyal, *Judges as Advicegivers*, 50 STAN. L. REV. 1709 (1998); Abner Mikva, *Why Judges Should Not Be Advicegivers: A Response to Professor Neal Katyal*, 50 STAN. L. REV. 1825 (1998); *supra* notes 107-10, 146 and accompanying text; sources cited *infra* note 151.

tionally difficult social arrangement to administer with success in part because the form “implies the reign of reason on the most extensive scale.”<sup>148</sup> The jurist remarked that the Founders clearly recognized the need for limiting the power which the governors exercise over the individuals whom they govern; premised the central government’s structure on checks and balances that would attain this objective; and considered the separation of powers principle to be a “felt necessity.”<sup>149</sup> Frankfurter claimed the Framers labored under no illusions about the hazards which concentrated authority presented, and the Justice perspicaciously warned that the “accretion of dangerous power does not come in a day [but] slowly from the generative force of unchecked disregard of the restrictions that fence in even the most disinterested assertion of authority.”<sup>150</sup>

The jurist adamantly disavowed the notion that the judiciary could serve as an overseer for the United States government, while he observed that federal courts must rigorously abide by a circumscribed view of the judicial function in addressing constitutional disputes and even refrain from deciding those complicated, sensitive controversies whenever this approach proves intellectually defensible.<sup>151</sup> After Frankfurter evinced profound reluctance about, but discerned no means to avoid, scrutiny of the powers and responsibilities which the other governmental branches exercise, the jurist proffered as the touchstone for resolving constitutional adjudication the famous pronouncement from Chief Justice John Marshall in *McCulloch v. Maryland* that “it is a *constitution* we are expounding.”<sup>152</sup> Frankfurter considered advice proffered by the revered jurist especially apropos when the Supreme Court is applying the separation of powers doctrine which underlies the document, and Frankfurter invoked the admonition from Justice Oliver Wendell Holmes that the principal ordinances in the Constitution “do not establish and divide fields of

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148. *Youngstown*, 343 U.S. at 593. See also *infra* notes 199-201 and accompanying text.

149. *Youngstown*, 343 U.S. at 593. See also *infra* notes 197-98, 202-04 and accompanying text.

150. *Youngstown*, 343 U.S. at 594. See also *infra* notes 167, 200-04 and accompanying text.

151. *Youngstown*, 343 U.S. at 594-95. See also LISA KLOPPENBERG, *PLAYING IT SAFE* (2001); TRIBE, *supra* note 7, at 311-464; Rachel Barkow, *More Supreme Than Court? The Fall of the Political Question Doctrine and the Rise of Judicial Supremacy*, 102 COLUM. L. REV. 237 (2002); *infra* note 231.

152. *Youngstown*, 343 U.S. at 596 (quoting *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 407 (1819) (emphasis in original)). See generally JEAN E. SMITH, *JOHN MARSHALL* (1996); Felix Frankfurter, *John Marshall and the Judicial Function*, 69 HARV. L. REV. 217 (1955); *infra* note 194 and accompanying text.

black and white.”<sup>153</sup>

Justice Frankfurter carefully disclaimed any need for examining, much less reaching definitive conclusions about, the chief executive's authority in the absence of legislation which he found to implicate presidential power for seizing the steel mills.<sup>154</sup> The Justice comprehensively surveyed relevant actions undertaken by members of Congress and determined that lawmakers had authorized executive branch seizure on sixteen occasions over the preceding three and a half decades but had qualified every particular grant with limitations and safeguards.<sup>155</sup> The jurist assessed what he described as the most recent, applicable legislative consideration of the issue; ascertained that senators and representatives forcefully and clearly withheld authority in 1947 by commanding the president to request explicit seizure power, should the officer need it; and disavowed imposition of any requirement for negating the “authority in formal legislation,” because Congress expressed the “will to withhold this power as though it had said so” specifically.<sup>156</sup> Frankfurter analyzed subsequent legislative activity, as well as important later and contemporaneous developments, most notably, the Korean conflict. However, he concluded that no authority had thereafter withdrawn the restriction instituted or changed the congressional perspective enunciated in the 1947 Labor Management Relations Act.<sup>157</sup>

The Justice found inappropriate the notion of narrowly confining constitutional law to the precise terms which the Founders had incorporated in the fundamental document while disregarding the “gloss which life has written upon them.”<sup>158</sup> For example, Frankfurter ex-

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153. *Youngstown*, 343 U.S. at 597 (Frankfurter, J., concurring) (quoting *Springer v. Government of Philippine Islands*, 277 U.S. 189, 209 (1928) (Holmes, J., dissenting)); *infra* note 237 and accompanying text.

154. *Youngstown*, 343 U.S. at 597 (Frankfurter, J., concurring). See also Felix Frankfurter, *Reading of Statutes-Some Reflections*, 47 COLUM. L. REV. 527 (1946); *supra* notes 105-10, 129-30 and accompanying text.

155. *Youngstown*, 343 U.S. at 597-98. See also *supra* notes 105-06, 108, 129-31 and accompanying text.

156. *Youngstown*, 343 U.S. at 602. Justice Frankfurter trenchantly observed that “it would be not merely infelicitous draftsmanship but almost offensive gaucherie to write such a restriction upon the President’s power in terms into a statute rather than to have it authoritatively expounded as it was, by controlling legislative history.” *Id.*, 343 U.S. at 603. See also *supra* notes 106, 110, 132-33 and accompanying text.

157. *Youngstown*, 343 U.S. at 603-10. Frankfurter observed that “to find authority so explicitly withheld is not merely to disregard in a particular instance the clear will of Congress. It is to disrespect the whole legislative process and the constitutional division of authority between President and Congress.” *Id.* at 609.

158. *Id.* at 610. See also *infra* note 189 and accompanying text.

pressed appreciation that a “systematic, executive practice, long pursued” with Congress’s knowledge and which lawmakers had left unquestioned over a protracted time might warrant treatment as a “gloss on ‘executive power’ vested in the President” by Article II of the Constitution.<sup>159</sup> Nevertheless, the jurist’s thoroughgoing review of earlier circumstances when the federal government had seized private commercial instrumentalities revealed that senators and representatives had not historically acquiesced to the exercise of executive authority.<sup>160</sup>

Justice Frankfurter briefly reexamined the limitations that the Framers imposed upon the efficiency of a government with distributed power, which litigants can challenge in federal court.<sup>161</sup> The jurist contended that the Founders deemed the price acceptable in light of the valuable safeguards which the restrictions afforded and quoted Justice Louis Brandeis for this proposition.<sup>162</sup> Frankfurter acknowledged how unpleasant he considered finding that the Truman Administration had exceeded its authority, especially when the President was animated by the crucial need to protect the country and to avert danger in a national crisis.<sup>163</sup> However, the jurist trusted the patriotism and wisdom of the executive and legislative branches would lead both institutions to reconcile their differences on issues which were overshadowed by momentous global events.<sup>164</sup>

In short, Justice Frankfurter clearly recognized the critical necessity for exercising judicial restraint, while he emphatically voiced grave doubts, premised on concerns related to the Supreme Court’s authority and legitimacy, about intervening in a dispute between the president and the members of Congress over separation of powers.<sup>165</sup>

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159. *Youngstown*, 343 U.S. at 610-11. See also *infra* note 245 and accompanying text.

160. *Youngstown*, 343 U.S. at 611-13. See also *infra* note 195 and accompanying text.

161. *Youngstown*, 343 U.S. at 613. See also *infra* note 209 and accompanying text.

162. *Youngstown*, 343 U.S. at 613-14. The Framers adopted separation of powers, “not to promote efficiency but to preclude the exercise of arbitrary power. The purpose was, not to avoid friction, but, by means of the inevitable friction incident to the distribution of the governmental powers among three departments, to save the people from autocracy.” *Id.* (quoting *Myers v. United States*, 272 U.S. 52, 240, 293 (1926) (Brandeis, J., dissenting)).

163. *Youngstown*, 343 U.S. at 614. See also *infra* note 212 and accompanying text.

164. He invoked a similar “moment of utmost anxiety” when President George Washington sought the Court’s advice which it could not give, while Frankfurter was heartened by the idea that Truman and Congress would continue to safeguard this heritage derived directly from Washington. *Youngstown*, 343 U.S. at 614.

165. We rely here on FELIX FRANKFURTER, *THE PUBLIC AND ITS GOVERNMENT* (1930); PHILIP KURLAND, *MR. JUSTICE FRANKFURTER AND THE CONSTITUTION* (1971);

Despite the substantial reluctance evidenced, the jurist felt compelled by his constitutional duty to declare that Truman lacked seizure authority.

b. Justice Jackson's Opinion

Justice Robert Jackson's concurrence, which Professor Sanford Levinson has characterized as the single most important opinion in the High Court's history, is principally renowned for the three-part analysis which the jurist devised for treating disagreements over political branch assertions of power.<sup>166</sup> However, the opinion is also important because it exemplifies Jackson's consummate ability to differentiate with clarity his role and perspective when serving as a Supreme Court Justice from his responsibilities and views as an adviser in several capacities, namely Solicitor General and Attorney General, for President Franklin Delano Roosevelt's Democratic Administration. For instance, Jackson warned that the question of a power's validity and the substantive policy which it is invoked to foster could be easily confused; that thorough, undefined presidential authority has pragmatic benefits and severe risks for the United States; and that undue emphasis on transient results may have enduring ramifications for the balanced power structure that had benefited the country so substantially for a century and a half.<sup>167</sup> Moreover, the concurrence might be the most lucid, straightforward exposition on the remarkable dearth of very clear and useful legal authority which applies to concrete issues that involve executive power as the questions manifest themselves in practice.<sup>168</sup> The Framers' intent must be divined from enigmatic sources, which 150 years of scholarly investigation and partisan debate had failed to illuminate,<sup>169</sup>

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JOSEPH LASH, FROM THE DIARIES OF FELIX FRANKFURTER (1975); MELVIN UROFSKY, FELIX FRANKFURTER (1991); Frankfurter, *supra* note 154.

166. *Youngstown*, 343 U.S. at 63-39 (Jackson, J., concurring); Sanford Levinson, *The Rhetoric of the Judicial Opinion*, in *LAW'S STORIES: NARRATIVE AND RHETORIC IN THE LAW* 187, 202-04 (Peter Brooks and Paul Gewirtz, eds., 1996). See also Katyal & Tribe, *supra* note 4, at 1285 (characterizing Jackson's analytical construct as "three now-canonical categories that guide modern analysis of separation of powers"); Morton Rosenberg, *Beyond the Limits of Executive Power: Presidential Control of Agency Rulemaking Under Executive Order 12,291*, 80 MICH. L. REV. 193, 199 (1981) (expressing preference for Jackson's opinion over Black's).

167. *Youngstown*, 343 U.S. at 634 (Jackson, J., concurring). See also REHNQUIST, *supra* note 2, at 2-20.

168. See *Youngstown*, 343 U.S. at 635-39. See also *infra* note 233.

169. The investigation and debate supply "more or less apt quotations from respected sources on" both sides of questions which "largely cancel each other." *Youngstown*, 343

while the Court's determinations are rather indecisive precisely because they address in the narrowest possible fashion the most profound matters.<sup>170</sup>

Jackson also declared that the pragmatic art of constitutional governance could not conform with judicial attempts to define the authority exercised by the three governmental branches, which derive from isolated clauses in the basic document or even specific Articles ripped from context.<sup>171</sup> The jurist recognized that the "Constitution diffuses power the better to secure liberty," although the Founders also envisioned that actual experience would integrate dispersed authority into a workable government, each coordinate branch of which would be separate but interdependent and autonomous yet reciprocal.<sup>172</sup> He observed that presidential powers were "not fixed but fluctuate, depending upon their disjunction or conjunction with those of Congress."<sup>173</sup>

Jackson introduced his three-pronged framework for assessment of federal governmental authority by describing the construct as a rather over-simplified categorization of practical instances in which the chief executive might doubt, or other observers could question, the president's power and by crudely differentiating the legal consequences that this factor of relativity produced.<sup>174</sup> The three classifications correspondingly delineate situations in which the chief executive's authority is greatest, least substantial and somewhere between those polar opposites.

The Justice maintained that the president exercises the maximum power when proceeding with explicit or implied congressional approval, because the authority encompasses all of the power which the chief executive possesses and all of the authority which senators and representatives delegate to the officer.<sup>175</sup> In this context, the president personifies the federal sovereignty, so that invalidation of a particular action which the official undertakes would mean that the "Federal Government as an undivided whole lacks power."<sup>176</sup>

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U.S. at 635 (citation omitted).

170. *Id.* See also *supra* note 151 and accompanying text; *infra* note 248 and accompanying text.

171. *Youngstown*, 343 U.S. at 635. See also *supra* notes 158-59 and accompanying text.

172. *Youngstown*, 343 U.S. at 635.

173. *Id.* See generally Black, *supra* note 116, at 98-99.

174. *Youngstown*, 343 U.S. at 635 (Jackson, J., concurring). See also *infra* text accompanying note 233.

175. *Youngstown*, 343 U.S. at 635.

176. *Id.* at 637. A presidential seizure executed under statute would receive the



Jackson characterized the second category as an intermediate area in which the chief executive proceeds without an express legislative grant or denial.<sup>177</sup> The president can depend on the officer's own authority alone; however, the Justice described a "twilight zone" where the chief executive and Congress may possess concurrent power or the distribution of authority remains unclear.<sup>178</sup> In these circumstances, therefore, legislative "inertia, indifference or acquiescence," as pragmatic matters, could occasionally permit, and even invite, independent presidential initiatives.<sup>179</sup> For the second grouping, he admonished that actual tests of power will probably reflect the "imperatives of events and contemporary imponderables, [not] abstract legal theories."<sup>180</sup>

The last classification includes presidential endeavors which conflict with explicit or implied congressional will. Jackson characterized the chief executive's authority as at its nadir, because the official can rely solely on the officer's express powers under the Constitution minus any relevant legislative branch authority.<sup>181</sup> In this situation, judges must carefully scrutinize claims to power and should uphold exclusive presidential authority only if courts disable Congress from acting on specific matters.<sup>182</sup>

Jackson then applied his three-part analytical framework to the Truman Administration's assertion of executive power for seizing the steel mills. The Justice promptly eliminated the claim from the initial category, because the United States government "conceded that no congressional authorization exists for this seizure."<sup>183</sup> The jurist excluded the assertion with similar expedition from the second classification, as lawmakers had not considered the seizure of industrial en-

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strongest presumption and the "widest latitude of judicial interpretation, and the burden of persuasion would rest heavily upon any who might attack it." *Id.* at 636-37. *See also infra* notes 240-41 and accompanying text.

177. *Youngstown*, 343 U.S. at 637 (Jackson, J., concurring) (citation omitted).

178. *Id.*

179. *Id.* *See also supra* notes 159-60 and accompanying text, *infra* notes 245-46 and accompanying text.

180. *Youngstown*, 343 U.S. at 637.

181. *Id.* *See also infra* notes 183-88 and accompanying text.

182. *Youngstown*, 343 U.S. at 637-38 (citation omitted). A claim so conclusive and preclusive requires scrutiny, as the constitutional system's equilibrium is at stake. *Id.* at 638. *See also Woods v. Cloyd W. Miller*, 333 U.S. 138, 146 (1948) (Jackson, J., concurring) (scrutinizing "war power"); Black, *supra* note 116, at 98.

183. *Youngstown*, 343 U.S. at 638. This also would remove the support of many declarations and precedents that were proffered in "relation, and must be confined to, this category." *Id.* (citation omitted).

terprises an open question.<sup>184</sup> He found senators and representatives had clearly intended to occupy the field through the prescription of several statutory procedures that prohibited the government from seizing and operating the steel companies, processes which the administration had not invoked.<sup>185</sup> Jackson vehemently rejected the notion that congressional failure to legislate with particularity on private property seizures required or encouraged the chief executive's selection of a different, inconsistent approach.<sup>186</sup>

The determinations reached above meant the presidential action must be supported exclusively under the third category's severe strictures, which derive substantiation solely from the executive power remaining after subtraction of applicable congressional authority over the area.<sup>187</sup> The Court could uphold the Truman Administration effort only by concluding that the seizure was within the chief executive's purview and beyond the legislative domain; therefore, judicial review proceeded under circumstances which left claims of presidential authority most susceptible to attack and in the least advantageous constitutional position.<sup>188</sup>

Jackson declared that the Chief Executive does not possess powers which are unmentioned in the Constitution, but the jurist promised that he would give the President's enumerated authority in the basic document the scope and elasticity afforded by what seem to be "reasonable practical implications," instead of the rigidity which a doctrinaire textualism would dictate.<sup>189</sup> The Justice concomitantly undertook a rather comprehensive review of the presidential power that the United States government asserted for seizing American steel corporations.

Jackson commenced with an examination of the Solicitor General's reliance on three specific clauses which appear in the Executive Article. The jurist initially rejected the argument that the clause which vested executive authority in the president comprised a grant

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184. *See id.* at 639. *See also supra* notes 129-32, 154-57 and accompanying text.

185. When supplying the government's needs, it may seize plants that do not comply with obligatory orders it placed or use eminent domain to condemn facilities. *Youngstown*, 343 U.S. at 639 (citation omitted). The third situation is when the nation's general economy requires protection. *Id.* (citation omitted).

186. *Id.* at 640. *See also supra* notes 156-57, *infra* notes 213-14 and accompanying text.

187. *Youngstown*, 343 U.S. at 640. *See also supra* note 181 and accompanying text.

188. *See Youngstown*, 343 U.S. at 640. *See also supra* note 182 and accompanying text.

189. *Youngstown*, 343 U.S. at 640. He rejected a "niggardly construction" as some clauses could become nearly unworkable and immutable by indulging no "latitude of interpretation for changing times." *Id.*

of very expansive executive power; Jackson considered it to allocate this office generic authority thereafter constitutionally prescribed and criticized the broad power Truman claimed by analogizing it to the “prerogatives exercised by George III.”<sup>190</sup> The Justice similarly negated the assertion premised on the commander-in-chief clause, because the president could effectuate an exponential increase in the official’s domination of domestic affairs by committing American armed forces to what the jurist described as international ventures.<sup>191</sup> Jackson, who assumed for the purposes of argument that the United States was at war, maintained the Constitution explicitly assigns Congress principal responsibility to supply the nation’s armed forces.<sup>192</sup> The Justice countered governmental dependence on the “take care” clause in Article II by proffering the Fifth Amendment proscription which involves deprivations of “life, liberty and property without due process of law.”<sup>193</sup> The jurist found the prohibition demonstrated that the United States is a “government of laws, not of men [who submit] to rulers only if under rules.”<sup>194</sup>

Jackson disparaged the Solicitor General’s attempt at premising the Truman Administration seizure upon “nebulous, inherent powers never expressly granted” but which ostensibly accrued to the office from the practices followed by numerous prior chief executives.<sup>195</sup> The jurist contended the loose and irresponsible employment of adjectives colored much legal, and all non-legal, discourse about presidential authority, while observers often use “interchangeably and without fixed or ascertainable meaning” inherent, implied, incidental,

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190. *Id.* at 640-41. See also *infra* note 202 and accompanying text.

191. *Youngstown*, 343 U.S. at 642 (citation omitted). See also *Korematsu v. United States*, 323 U.S. 214, 243 (1944) (Jackson, J., dissenting) (voicing analogous concerns in a similar context); *supra* notes 91, 134-36, *infra* notes 287, 296 and accompanying text. See generally PETER IRONS, *JUSTICE AT WAR* (1983).

192. *Youngstown*, 343 U.S. at 643. See also U.S. CONST. art. II, § 8, cls. 12-14. He indulged this power little latitude when “turned inward on a labor-industry economic struggle.” *Youngstown*, 343 U.S. at 645.

193. *Youngstown*, 343 U.S. at 646; See also U.S. CONST. art. II, § 3, amend. V; *supra* note 140 and accompanying text; *infra* note 207 and accompanying text.

194. *Youngstown*, 343 U.S. at 646. See also *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803); DAVID MCCULLOUGH, *JOHN ADAMS* 282 (2001); William Van Alstyne, *A Critical Guide to Marbury v. Madison*, 1969 DUKE L.J. 1; Katyal & Tribe, *supra* note 4, at 1289; *infra* note 291 and accompanying text.

195. *Youngstown*, 343 U.S. at 646. Justice Jackson described the President’s argument as a plea for power to treat a crisis according to its necessities, the unstated “assumption being that necessity knows no law.” *Id.*

plenary, war and emergency powers.<sup>196</sup> The Justice forcefully repudiated the argument that the Supreme Court should discover inherent authority present for treating national crises, as the Framers had refused to provide explicitly for these particular circumstances in the Constitution.<sup>197</sup> He believed Congress might have afforded, yet decided not to grant, the chief executive substantial emergency power; therefore, the High Court should refrain from recognizing this type of authority primarily because the notion lacks any beginning or end.<sup>198</sup>

Jackson concluded with a dissertation on modern constitutional governance at the mid-twentieth century. The Justice determined that “vast accretions of federal power, eroded from that reserved by the States, have magnified the scope of presidential activity,” that the contemporary chief executive could exert substantial “leverage upon those who are supposed to check and balance” the official’s significant authority, which frequently cancelled their effectiveness; and that the existing political party system in America exacerbated the circumstances delineated.<sup>199</sup> These propositions led the jurist to observe that the Supreme Court must not further aggrandize the office of president, which he asserted was already so powerful and comparatively immune from judicial review, at Congress’s expense.<sup>200</sup> Jackson distilled the essence of free government — a concept that American constitutionalism “is fashioned to fulfill . . . so far as humanly possible” — as government “by those impersonal forces which we call law.”<sup>201</sup> The Justice declared that the “Executive, except for recommendation and veto, has no legislative power,” that the challenged endeavor originated in the will of the president and constituted an “exercise of authority without law,” and that the best technique for

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196. See *id.* at 646-47. *Accord* *Dames & Moore v. Regan*, 453 U.S. 654, 661-62 (1981). See also John E. Nowak & Ronald D. Rotunda, *A Comment on the Creation and Resolution of a “Nonproblem.”* *Dames & Moore v. Regan, The Foreign Affairs Power, and the Role of the Court*, 29 UCLA L. REV. 1129, 1155 (1981).

197. One exception is the habeas corpus writ’s suspension during rebellion or invasion. *Youngstown*, 343 U.S. at 650. See also U.S. CONST. art. II, § 9, cl. 2; *supra* notes 16-20 and accompanying text.

198. *Youngstown*, 343 U.S. at 653. See also *infra* notes 221-22 and accompanying text.

199. *Youngstown*, 343 U.S. at 653-54. For today’s Office, see also Martin Flaherty, *The Most Dangerous Branch*, 105 YALE L.J. 1725 (1996); Abner Greene, *Checks and Balances in an Era of Presidential Lawmaking*, 61 U. CHI. L. REV. 123 (1994). But see Morrison v. Olson, 487 U.S. 654, 716 (1988) (Scalia, J., dissenting); Steven Calabresi & Saikrishna Prakash, *The President’s Power to Execute the Laws*, 104 YALE L.J. 541 (1994).

200. *Youngstown*, 343 U.S. at 654 (citation omitted). See also *supra* note 167 and accompanying text.

201. *Youngstown*, 343 U.S. at 654-55. See also *supra* note 194 and accompanying text.

preserving free government was to have the executive under the substantive law, which parliamentary deliberations formulated.<sup>202</sup> Finally, the jurist admonished that these venerable institutions, which had served the United States exceptionally well for such an extended period “may be destined to pass away,” but the High Court must be last, rather than first, to abandon them.<sup>203</sup>

In short, Justice Jackson’s concurrence enunciated a three-pronged framework for evaluating power allocation between the chief executive and the Congress. That articulation of authority’s distribution has become the touchstone which the Supreme Court and legal commentators have employed to assess separation of powers questions that have arisen since *Youngstown’s* issuance. Presidential authority is greatest whenever the legislative branch explicitly authorizes an action and least when lawmakers expressly or implicitly disavow the effort, while there remains a twilight zone in which concurrent power exists or the distribution of authority is unclear. The Justice’s application of this analytical regime to the steel seizure order prompted his conclusions that the power asserted by the chief executive was at its lowest ebb and that invalidation of the presidential initiative was appropriate. It is important to remember that Jackson had served as a prosecutor at Nuremberg and had been the Solicitor General and the Attorney General in the Justice Department during the Roosevelt Administration, which confronted several national emergencies, namely the great depression and World War II. These experiences made him, as a Justice, keenly aware of the need for swift, efficient governmental action and of the complex, subtle issues that implicated separation of powers. Moreover, Jackson was a rather conservative jurist, who was acutely sensitive to actions which might undermine the Supreme Court’s authority and credibility, especially when resolving disputes over political branch power. Nevertheless, the Justice was required by constitutional oath and concerns about the breadth of claims respecting executive authority to rule that the President had overstepped his power.<sup>204</sup>

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202. *Youngstown*, 343 U.S. at 655 (no one would know the limits of the power sought to be asserted or the rights potentially infringed). See also *supra* note 137-140, 143-45 and accompanying text.

203. *Youngstown*, 343 U.S. at 655 (citation omitted). See also *supra* notes 151-53 and accompanying text.

204. Jackson voiced similar views in cases that involved analogous issues. See *supra* notes 182, 191, *infra* notes 293-94 and accompanying text. See also ROBERT JACKSON, *THE STRUGGLE FOR JUDICIAL SUPREMACY* (1941); ROBERT JACKSON, *THE SUPREME COURT IN THE AMERICAN SYSTEM OF GOVERNMENT* (1955).

## c. Justice Douglas' Opinion

Justice Douglas employed modes of decisionmaking, and expressed sentiments, analogous to those in the opinions that we evaluated above.<sup>205</sup> The central themes in the Douglas concurrence, however, were that the branch of the Federal Government which possessed constitutional authority to act and the legislative nature of the Truman initiative.<sup>206</sup> The Justice characterized the Executive Order's purpose as "condemning property [and] a taking in the constitutional sense," while he declared that Congress, the governmental branch which has the "power to pay compensation for a seizure is the only one able to authorize a seizure or make lawful one that the President had effected."<sup>207</sup> Moreover, Douglas strongly and clearly rejected the notion of sanctioning the Truman Administration's power assertion because the Supreme Court would enlarge and rewrite Article II for the current emergency's political conveniences and would cede the president legislative authority which the official simply did not have.<sup>208</sup> The Justice concluded with the observation that the nation pays dearly for the scheme of checks and balances as well as separated powers among the three governmental branches, a price which might appear exorbitant.<sup>209</sup> Nonetheless, the Jurist admonished that the seizure mechanism's employment for what apparently are the most pressing and benign ends at a given historical moment could be transformed into an instrument of oppression in the future.<sup>210</sup>

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205. *Youngstown*, 343 U.S. at 629 (Douglas, J., concurring). For example, he, like the opinions' authors stressed separation of powers and distinctions between legislative and executive authority as well as military affairs and civilian matters. *Id.* at 629-34. See also *supra* notes 134-36, 149, 191 and accompanying text.

206. A decision to apply sanctions, to place the law's force on parties and to direct the Court's force against them "is an exercise of legislative power." *Youngstown*, 343 U.S. at 630 (Douglas, J., concurring).

207. *Id.* at 631-32. The condemnation provision in the Fifth Amendment apparently dictated these propositions, which comported with the perspectives on checks and balances propounded in Justice Black's opinion for the majority. *Id.* at 632. See also *supra* notes 127-44, 193 and accompanying text.

208. *Youngstown*, 343 U.S. at 633 (Douglas J., concurring) (this "step would most assuredly alter the pattern of the Constitution" while rhetorically stating that future generations might "deem it so urgent that the President have legislative authority that the Constitution will be amended").

209. *Id.* (an inherent risk is stalemates that allow crises to mount and the country to suffer when the "White House and Capitol Hill" do not cooperate). See also *supra* notes 161-62 and accompanying text.

210. *Youngstown*, 343 U.S. at 633-34. His approach to legislative silence seems most sound. Espousal of an "underlying constitutional rule," which invalidated the seizure, ab-

d. The Opinions of Justice Burton and Justice Clark

We accord comparatively limited treatment to the concurring decision of Justice Harold Burton<sup>211</sup> and to the opinion of Justice Tom Clark, who concurred in the High Court's judgment but not in the Black opinion for the majority.<sup>212</sup> Neither jurist enunciated particularly new insights. For example, because lawmakers had authorized specific procedures for the chief executive and reserved the prerogative to decide exactly when seizure might be appropriate, Justice Burton determined that the Truman Administration Executive Order "invaded the jurisdiction of Congress [and] violated the essence of the principle of the separation of governmental powers."<sup>213</sup> Justice Clark similarly found that presidential failure to follow the legislatively — prescribed process required the Justice to invalidate the steel seizure order.<sup>214</sup>

4. *The Dissenting Opinion in Youngstown*

Chief Justice Fred Vinson, whom Justice Stanley Reed and Justice Sherman Minton joined, wrote a dissenting opinion in the *Youngstown* case.<sup>215</sup> The three Supreme Court members dissented because the crucial litigation posed vitally important questions, which held transcendent significance for Truman's authority and for the power of future chief executives to address efficaciously crises that threaten the country.<sup>216</sup> The determination by Chief Justice Vinson consumed a number of pages in the United States Reports, while he deployed assessment techniques, and reached conclusions, quite dif-

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sent Congress' express prior consent, prevents the President from confronting it with a *fait accompli*. See *TRIBE*, *supra* note 7, at 672. See also WILLIAM O. DOUGLAS, *THE COURT YEARS* (1980); WILLIAM O. DOUGLAS, *WE THE JUDGES* (1956).

211. *Youngstown*, 343 U.S. at 655 (Burton, J., concurring). See also REHNQUIST, *supra* note 2, at 182-83.

212. *Youngstown*, 343 U.S. at 660 (Clark, J., concurring) (Clark, like Jackson, had served as U.S. Attorney General). See also *infra* note 222 (Clark, like Frankfurter, evinced regret about invalidating Truman's action). See also *supra* note 62 and accompanying text. See generally REHNQUIST, *supra* note 2, at 183.

213. *Youngstown*, 343 U.S. at 660. See also *supra* notes 143-44 and accompanying text.

214. *Youngstown*, 343 U.S. at 667. He invoked Justice Joseph Story's advice about judicial review of executive action: the Supreme Court must expound the laws as found in the records of state and "cannot, when called upon by the citizens of the country, refuse [its] opinion, however it may differ from that of very great authorities." *Id.* at 666-67 (citing *The Orono*, 18 Fed. Cas. No. 10, 585 (C.C.D. Mass. 1812)).

215. *Youngstown*, 343 U.S. at 667 (Vinson, C. J., dissenting). See generally MARCUS, *supra* note 2.

216. *Youngstown*, 343 U.S. at 667. The dissent also found that no ground could support affirmance.

ferent from those of his colleagues who were in the majority. Nevertheless, we accord comparatively limited treatment to the dissenting opinion principally because this decision has not withstood the test of time.

Chief Justice Vinson initially evaluated the particular factual context in which President Truman sought to exercise his authority. The jurist admonished observers who found the situation to implicate an exceptional assertion of power that the chief executive was responsible for governing in an extraordinary period.<sup>217</sup> Vinson thoroughly canvassed the relevant developments which had preceded the Truman Administration's decision to promulgate the order and discovered no basis for questioning the president's determination of an emergency.<sup>218</sup>

The jurist then consulted the executive authority granted by the Constitution and stated that the Framers "deliberately fashioned [the Presidency] as an office of power and independence."<sup>219</sup> The Chief Justice accused those who challenged the Executive Order's validity of seeking to amend the Constitution and claimed that Supreme Court expansion of the fundamental document was unnecessary because "history and time-honored principles of constitutional law" supported the Truman Administration seizure.<sup>220</sup> Vinson comprehensively reviewed the plethora of previous occasions on which presidents had addressed national emergencies by acting resolutely and expeditiously to enforce legislative programs or to save congressional projects until senators and representatives could respond.<sup>221</sup> He contended that this historical survey of executive initiatives could easily sustain the order seizing the steel mills.<sup>222</sup>

The Chief Justice next carefully scrutinized the efforts instituted by President Truman and found the official had taken care that the laws were faithfully executed; in particular, the President had fully informed legislators that the officer's endeavors were meant to preserve

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217. *Id.* at 668. See generally THEODORE ROOSEVELT, AUTOBIOGRAPHY 372 (1914); WILLIAM HOWARD TAFT, OUR CHIEF MAGISTRATE AND HIS POWERS 139-40 (1925).

218. *Youngstown*, 343 U.S. at 668-78 (Vinson, C.J., dissenting).

219. *Id.* at 682. See also THE FEDERALIST NO. 77, at 459 (Alexander Hamilton) (Clinton Rossiter, ed. 1961). But see THE FEDERALIST NOS. 47 & 48, at 301, 308 (James Madison).

220. See *Youngstown*, 343 U.S. at 683.

221. See *id.* at 683-700.

222. *Id.* at 700. Chief Justice Vinson and Justice Clark advised President Truman that he possessed sufficient authority to seize the steel mills. See DAVID G. MCCULLOUGH, TRUMAN 896-97 (1992).



their prerogatives and not to defy congressional will.<sup>223</sup> Vinson saw little reason for fearing dictatorship or executive tyranny when the President faithfully implements the laws and maintains the status quo, until lawmakers have sufficient opportunities to consider and adopt appropriate responses.<sup>224</sup>

The dissenters concluded that judicial, legislative and executive branch precedents demonstrated President Truman had thoroughly complied with his responsibilities under the Constitution.<sup>225</sup> The three justices determined the chief executive had promptly notified senators and representatives of the initiative undertaken and had clearly stated his intention to honor lawmakers' prerogatives, while the dissent declared that "[n]o basis for claims of arbitrary action, unlimited powers or dictatorial usurpation of congressional power appears from the facts of this case."<sup>226</sup>

#### D. The Meaning Subsequently Accorded *Youngstown*

The Supreme Court has rather infrequently relied upon Justice Hugo Black's opinion for the majority in *Youngstown* over the ensuing half century. To be sure, on some occasions, the High Court or individual members have invoked the Black determination principally for ideas respecting separation of powers.<sup>227</sup> However, the Supreme

223. *Youngstown*, 343 U.S. at 701-04.

224. *Id.* at 704.

225. *Id.* at 710. See generally REHNQUIST, *supra* note 2, at 135-36, 147-48, 183-84.

226. *Youngstown*, 343 U.S. at 710. See also *supra* notes 145-46 and accompanying text. Truman reflected:

Whatever the six justices [] meant by their differing opinions about the constitutional powers of the President, he must always act in a national emergency. . . . We live in an age when hostilities begin without polite exchanges of diplomatic notes. There are no longer sharp distinctions between combatants and noncombatants, between military targets and the sanctuary of civilian areas. Nor can we separate the economic facts from the problems of defense and security. [The] President, who is Commander in Chief and who represents the interest of all the people, must be able to act at all times to meet any sudden threat to the nation's security.

HARRY S. TRUMAN, MEMOIRS: YEARS OF TRIAL AND HOPE 478 (1956). For *Youngstown's* contemporary analysis, see Edward S. Corwin, *The Steel Seizure Case: A Judicial Brick Without Straw*, 53 COLUM. L. REV. 53 (1953); Paul Kauper, *The Steel Seizure Case: Congress, The President And The Supreme Court*, 51 MICH. L. REV. 141 (1952).

227. See, e.g., *N.Y. Times v. United States*, 403 U.S. 713, 731, 740 (1971) (White, J., concurring); *Kent v. Dulles*, 357 U.S. 116, 128-29 (1958). See also *United States v. Nixon*, 418 U.S. 683, 703-07 (1974); Robert V. Percival, *Presidential Management of the Administrative State: The Not-So-Unitary Executive*, 51 DUKE L.J. 963, 972 (2001) (stating that lower federal courts have applied *Youngstown* to declare illegal actions directed by executive orders which Presidents Bush and Bill Clinton issued). See generally MARCUS, *supra* note 2, at 228-48.

Court has more often applied the concurrence by Justice Robert Jackson primarily for the three-part analytical framework, which the jurist constructed to resolve interbranch disputes between the president and Congress. The phenomenon's quintessential example, and perhaps the most valuable illustration of subsequent High Court dependence on *Youngstown* in a rather closely-related context, is the opinion written by Justice William H. Rehnquist when resolving the 1981 case of *Dames & Moore v. Regan*.<sup>228</sup> This decision has assumed peculiar importance for several reasons. First, its author not only invoked the Jackson concurrence but also instructively explained, and expanded on, the framework for evaluation propounded. Moreover, Justice Rehnquist served as a judicial law clerk for Justice Jackson during the October 1951 Term when the Supreme Court issued *Youngstown*.<sup>229</sup> Furthermore, Rehnquist became Chief Justice of the United States a half decade after penning the determination in *Dames & Moore*, and the jurist will probably preside over the High Court that would resolve challenges to the November 13 Executive Order.

In the *Dames & Moore v. Regan* case, petitioners attacked President Jimmy Carter's order which nullified certain attachments of Iranian property, required that individuals who held blocked Iranian securities and funds transfer those assets to the New York Federal Reserve Bank and eventually Iran, as well as suspended pending claims against Iran and relegated litigants which pursued them to an international claims tribunal; the chief executive proffered five different sources of explicit and implied power as support for the initiative.<sup>230</sup> Justice Rehnquist initially remarked that the parties and the lower federal courts in the *Dames & Moore* lawsuit all denominated the *Youngstown* opinion as the source of considerable applicable analysis.<sup>231</sup> The jurist briefly alluded to the decision written for the Court by Justice Black, which recognized that the chief executive's authority, if any relevant power existed, must derive from a federal

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228. 435 U.S. 654 (1981). See generally *Symposium*, *Dames & Moore v. Regan*, 29 UCLA L. REV. 977-1159 (1982); KOH, *supra* note 112, at 138-43, 197-98.

229. REHNQUIST, *supra* note 2, at 2-20; Arthur S. Miller, *Dames & Moore v. Regan: A Political Decision by a Political Court*, 29 UCLA L. REV. 1104, 1109 n.27 (1981); Nowak & Rotunda, *supra* note 196, at 1156.

230. See *Dames & Moore*, 453 U.S. at 669. See generally Nowak & Rotunda, *supra* note 196.

231. *Dames & Moore*, 453 U.S. at 668 (invoking the proposition about the federal judiciary as the nation's "overseer" propounded by Justice Frankfurter, *supra* note 151 and accompanying text).

statute or from the United States Constitution.<sup>232</sup>

Rehnquist then observed that the concurring determination authored by Justice Jackson had expounded in a comparatively generalized manner the “consequences of different types of interaction between the two democratic branches in assessing Presidential authority to act in any given case.”<sup>233</sup> Justice Rehnquist afforded a lucid, succinct rendition of Jackson’s three-pronged framework, while the jurist quoted extensively from the concurrence which Jackson crafted in *Youngstown*.<sup>234</sup>

Justice Rehnquist remarked that the Supreme Court had on earlier occasions, and in *Dames & Moore*, considered analytically helpful Jackson’s organizational schematic, which parsed executive initiatives into three general classifications.<sup>235</sup> Nevertheless, Rehnquist stated that even Jackson characterized those categories as “a somewhat oversimplified grouping,”<sup>236</sup> while Rehnquist reminded his colleagues of the Holmesian admonition, which Justice Frankfurter had reproduced in the jurist’s *Youngstown* concurrence.<sup>237</sup> Justice Rehnquist, accordingly, instructed that any individual presidential action ranges somewhere along a broad spectrum from explicit congressional authorization to express legislative proscription, rather than fits “neatly in one of three pigeonholes,” especially when the chief executive is treating international emergencies which the members of Congress could not have anticipated.<sup>238</sup>

Having proffered this informative explication and elaboration of Jackson’s triadic formulation that addresses interbranch disputes which implicate power, Justice Rehnquist ultimately relied on the analytical construct in essence as articulated by the *Youngstown* concurrence to resolve the contested question of presidential authority

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232. See *Dames & Moore*, 453 U.S. at 668. See also *Youngstown*, 343 U.S. at 585. See generally *supra* notes 128-45 and accompanying text.

233. *Dames & Moore*, 453 U.S. at 668. See also *id.* at 660 (invoking several important historical propositions propounded by Justice Jackson, *supra* notes 169-170 and accompanying text).

234. *Dames & Moore*, 453 U.S. at 668-669. See also *Youngstown*, 343 U.S. at 637-38 (Jackson, J., concurring).

235. *Dames & Moore*, 453 U.S. at 669. See also *supra* notes 174-87 and accompanying text.

236. *Dames & Moore*, 453 U.S. at 669. See also *Youngstown*, 343 U.S. at 635 (Jackson, J., concurring). See generally *supra* note 174 and accompanying text.

237. Justice Holmes observed that the Constitution’s great ordinances do not “establish and divide fields of black and white.” *Dames & Moore*, 453 U.S. at 669. See also *supra* note 153 and accompanying text.

238. *Dames & Moore*, 453 U.S. at 669.

presented.<sup>239</sup> Because Rehnquist ascertained that Carter had acted with explicit legislative approval when the chief executive promulgated the order which nullified attachments and transferred assets, the jurist accorded the endeavors the strongest presumptions and broadest latitude of judicial construction while litigants that challenged these efforts assumed a substantial burden of persuasion.<sup>240</sup> When Rehnquist applied the strict tests which he had gleaned from Jackson's first category, the jurist observed that the petitioners had not satisfied the formidable requirements delineated, and a contrary determination would have meant the "Federal Government as a whole lacked the power exercised by the President," a perspective which the members of the Court refused to countenance.<sup>241</sup>

Justice Rehnquist also acknowledged that chief executives' initiatives which eliminated federal court jurisdiction to resolve cases and controversies in contravention of Article III or congressional legislation would be invalid.<sup>242</sup> However, the jurist found the Carter Administration order did "not divest the federal court of 'jurisdiction'" but only purported "to 'suspend' the claims"<sup>243</sup> and, therefore, the situation exemplified the "difference between modifying federal-court jurisdiction and directing the courts to apply a different rule of law."<sup>244</sup> Rehnquist concomitantly asserted that the President had exercised authority, "acquiesced in by Congress, to settle claims and [, thus,] simply effected a change in the substantive law governing the lawsuit,"<sup>245</sup> while the jurist considered several enactments as suggesting indirect legislative "acceptance of a broad scope for executive action in circumstances such as those presented in this case."<sup>246</sup>

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239. See *id.* at 674. See also *supra* notes 174-88 and accompanying text.

240. See *Dames & Moore*, 453 U.S. at 674 (quoting *Youngstown*, 343 U.S. at 637 (Jackson, J., concurring)). See also Nowak & Rotunda, *supra* note 196, at 1156; *supra* notes 175-76 and accompanying text.

241. *Dames & Moore*, 453 U.S. at 674 (quoting *Youngstown*, 343 U.S. at 636-37 (Jackson, J., concurring)). See also *supra* note 176 and accompanying text.

242. *Dames & Moore*, 453 U.S. at 684. See also Nowak & Rotunda, *supra* note 196, at 1158.

243. *Dames & Moore*, 453 U.S. at 684.

244. *Id.* at 685 (citation omitted).

245. *Id.* at 685. He analogized this acquiescence to, and cited, ideas in Frankfurter's *Youngstown* opinion. *Id.* at 686. See also Bradley & Goldsmith, *supra* note 76, at 252; *supra* notes 159-60 and accompanying text.

246. *Dames & Moore*, 453 U.S. at 677. He avoided admitting the holding would allow the president to present Congress with the type of *fait accompli* implicitly rejected by *Youngstown*, but the results can be reconciled by not treating the transferred claims as "takings." TRIBE, *supra* note 7, at 675. Other 20th century foreign affairs cases have also

In sum, the Supreme Court has generally followed the approach which the majority espoused in *Youngstown Sheet & Tube Co. v. Sawyer* and has not relied on the dissent, while the High Court has more frequently invoked Justice Jackson's concurrence than the opinions of Justice Black or the other members who concurred. We consider *Dames & Moore v. Regan* to be the most relevant *Youngstown* progeny, while Justice Rehnquist developed, but did not employ, a useful gloss on the Jackson three-part framework when resolving the dispute. *Dames & Moore* appears in tension with *Youngstown*, particularly to the extent the earlier decision concludes the applicable legislative activity might require that Congress expressly authorize presidential initiatives; however, these dimensions of the cases can be reconciled.<sup>247</sup> Moreover, *Dames & Moore* warrants a narrow reading, as Justice Rehnquist carefully admonished,<sup>248</sup> while the unique situation presented by the critical need to secure release of the hostages held in Iran confines and explains the determination. The fourth section applies *Youngstown* to the Bush Order.

#### IV. Why the Bush Order Fails the *Youngstown* Test

This part of the article scrutinizes the Bush Administration Executive Order in light of the analytical framework enunciated by *Youngstown*, considering Justice Black's opinion for the Supreme Court, the separate decisions which the concurring Justices wrote, and the subsequent *Dames & Moore* case. We conclude that the Bush Order fails the *Youngstown* test, at least insofar as the directive purportedly authorizes indefinite detention of non-citizens and denies covered individuals federal court access.

Our treatment begins with a restatement of the *Youngstown* determination's controlling rationale, derived from synthesizing the various opinions penned by the six Justices who concurred in the substantive result. We then apply the approach to the Executive Order, exploring the directive's provisions, which govern the detention of suspected terrorists and federal court jurisdiction, in the context of how Congress expressed its will on those subjects both before and af-

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not required presidents to have Congress' express approval. *Id.* at 675-76.

247. See *supra* note 246. See also Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2320 (2001) (applying *Youngstown* to the modern administrative state); Percival, *supra* note 227 (same).

248. *Dames & Moore*, 453 U.S. at 661 ("We attempt to lay down no general 'guidelines' covering other situations [and] to confine the opinion only to the very questions necessary to decision of the case.").

ter President Bush promulgated the order on November 13, 2001. The section also examines and rejects the claim that the Constitution grants the Chief Executive the authority to detain suspects and prescribe jurisdiction, even when presidential actions contravene apparent legislative will. The part next assesses the order's provisions through the separate *Youngstown* decisions authored by Justices Frankfurter, Jackson and Douglas, to the extent the concurrences might employ evaluative methods distinct from our synthesis of what *Youngstown* held.

### A. *Youngstown's* Analytical Framework

We acknowledged above that the precise holding in *Youngstown* resists felicitous delineation, principally because there are numerous and somewhat diverse concurring opinions. Nevertheless, it is possible to articulate a fair, clear, synthetic approach to Justice Black's determination for the Court and the decisions that the concurring Justices wrote. Our study of the Truman Administration steel seizure order; the directive's historical, and especially its legislative, milieu; the opinions of the six Justices who found the order unconstitutional; and subsequent judicial and academic commentary related to the determination suggest that *Youngstown's* essential meaning can be enunciated in terms of five fundamental propositions.

First, when a court analyzes whether an executive order comprises executive branch lawmaking that violates the Constitution, the court should determine whether the challenged directive furthers congressional will. Second, when ascertaining legislative will on a particular subject, the court should assess strong indicia of this will, such as recent congressional denials of executive branch requests for legislation, and is not restricted to the language of enacted statutes. Third, if the court decides that the executive order comports with the lawmakers' will on the specific issue, it ought to deem the directive a valid exercise of the executive power granted the president by Article II, so long as the matter is one for which the Constitution prescribes any federal authority. Fourth, should the court determine that the executive order violates congressional will, expressed in a passed statute or implied from prior legislative refusal to enact laws, the court will sustain the order only if the subject is one which Article II of the Constitution commits to the president, acting alone.<sup>249</sup> Fifth, when considering whether Article II delegates a matter solely to the

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249. See *supra* notes 181-82, 187-88 and accompanying text.

chief executive, the court should evaluate claims that the document does so in light of constitutional text and history which support the contrary conclusion - that Article I or any relevant Amendments assign Congress legislative powers over the subject.

## **B. Applying this Framework to the Bush Order**

Application of this framework for analysis to the provisions of the Bush Order that authorize indefinite detention and preclude any federal judicial review of actions taken under the Order compels the conclusion that these provisions are unconstitutional. First, if a court applied our initial two propositions, it would find that the provisions contravene recent expressions of congressional will on both topics. As explained above, in the weeks following the September 11 terrorist attacks, the Bush Administration sought legislation that would authorize the indefinite detention of non-citizens certified by the Attorney General to be suspected of international terrorism.<sup>250</sup> This request provoked vigorous opposition voiced by senators and representatives in each political party.<sup>251</sup> The Bush Administration first insisted that it never intended the apparent meaning of the draft bill the Administration had tendered to Congress, then resubmitted substantially the same language, and finally acquiesced in the phrasing of Senate Bill 1510, which limited non-citizen detentions to seven days, absent the filing of criminal charges or the initiation of deportation proceedings.<sup>252</sup> Legislators also assiduously preserved meaningful federal judicial scrutiny of "any action or decision relating to this section[,] including judicial review of the merits of" the Attorney General's certification that the officer had reasonable grounds for believing the non-citizen was a terrorist or otherwise a national security threat.<sup>253</sup>

Congress' decision to preserve judicial review of non-citizen detentions alone would sufficiently evidence the importance which lawmakers accorded federal court oversight of executive branch actions to support an inference that legislators would have also rejected the Bush Order's language which proscribed judicial review alto-

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250. See *supra* notes 51-55 and accompanying text.

251. See *supra* notes 57-64 and accompanying text.

252. See *supra* notes 64-72 and accompanying text.

253. See *supra* note 71 and accompanying text. One way that Congress ensured federal judicial review would be a realistic option for non-citizen detainees was to reject the Administration's request that detainees file petitions for habeas corpus in the District of Columbia federal courts. See also *supra* note 72 and accompanying text.

gether. It bears emphasis that the Administration never proffered a proposal which would have prevented any person whom the directive covered from seeking federal judicial review, to Senate and House members but rather asserted the notion for the first time in the Executive Order. There, in fact, is an additional, perhaps clearer, indication that Congress would not enact a statute that so limits federal courts access. The bill that Senate Judiciary Chair Leahy introduced explicitly required that any non-citizen subjected to trial in a military commission be granted an appeal as of right to the United States Court of Appeals for the Armed Services, with an opportunity for further review in the United States Supreme Court by petition for a writ of certiorari.<sup>254</sup>

Insofar as this legislative history differs from the one the *Youngstown* majority and concurring opinions considered to evidence congressional disapproval of Truman's steel industry seizure, we believe the developments which transpired in fall 2001 and winter 2002 even more forcefully demonstrate that the Bush Order violates the legislative will, especially in terms of contemporaneity and clarity. The *Youngstown* Court primarily relied upon a prior Congress' rejection of an executive branch request for seizure authority five years before the crisis that precipitated the Truman Order and three years before the United States entered the Korean conflict. During September 2001, however, the Bush Administration approached lawmakers in the aftermath of the September 11 terrorist attacks, when the circumstances that ostensibly justified the extreme measures sought were clear to legislators and the American public. Even so, senators and representatives, aware of the extant dangers and risking political opprobrium,<sup>255</sup> flatly rejected the Bush Administration's request for the power to detain non-citizens indefinitely and vehemently resisted efforts to circumscribe federal judicial review of the limited detention authority granted.<sup>256</sup> The Bush Order concomitantly prompted clear, sharp challenges from congressional leaders, a series of Senate Judiciary Committee hearings that documented constitutional objections to the directive, and proposed legislation, introduced independently in both houses of Congress, which sought to control executive branch deployment of the military tribunals that the Order instituted. In contrast, Truman's request for legislative ratification of

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254. See *supra* notes 97-105 and accompanying text.

255. See *supra* note 52 and accompanying text.

256. See *supra* notes 54-72 and accompanying text.



his steel seizure order elicited no congressional response.<sup>257</sup> The recent record is as powerful as, if not stronger than, the developments which supported the *Youngstown* majority's conclusion that the Truman Order contravened lawmakers' will.

Second, a court applying our recommended framework for assessment would then consider proposition four, because the third proposition is irrelevant to executive orders which conflict with legislative will. The only grant of constitutional authority even arguably applicable to the Bush Order, and the sole one that the directive invokes, is in Article II, which designates the president as "commander-in-chief" of the United States armed forces.<sup>258</sup> Truman similarly placed great reliance on this power when substantiating his steel seizure order.<sup>259</sup> Integral to the *Youngstown* Court's finding that the Truman Order exceeded the president's commander-in-chief authority was its conclusion, which our fifth proposition reflects: constitutional text and history revealed Congress, not the president, was the political branch of the federal government accorded primary responsibility to take domestic private property when the public good required it. In reaching this determination, the Justices relied upon the Constitution's delegation of the lawmaking power to Congress,<sup>260</sup> the document's assignment of the principal role for supplying the armed forces to the legislative branch,<sup>261</sup> the Fifth Amendment's prohibition on the deprivation of "property without due process of law,"<sup>262</sup> and the requirement for "just compensation" to be paid the owners of private property taken for the public good.<sup>263</sup>

The *Youngstown* precedent also compels the conclusion that the provisions of the Bush Order which we have identified as constitutionally suspect do, indeed, overstep the authority of the president when acting as commander-in-chief. Constitutional language and history demonstrate that Congress, rather than the president, is the political branch entrusted with the prescription of federal court jurisdic-

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257. See *supra* notes 115-16 and accompanying text.

258. See Bush Order, *supra* note 3.

259. See *supra* notes 1, 113, 134-36, 191-92 and accompanying text.

260. See *supra* notes 128-45 and accompanying text (discussing Black's opinion for the Court in *Youngstown*). See also *supra* notes 200-02 and accompanying text.

261. See *supra* notes 166-204 and accompanying text (discussing Jackson's *Youngstown* concurrence).

262. See *id.* See also *supra* note 140 and accompanying text.

263. See *supra* notes 205-09 and accompanying text (discussing Douglas's *Youngstown* concurrence).

tion.<sup>264</sup> Article III expressly delegates lawmakers the power for making “Exceptions” to the appellate jurisdiction of the United States Supreme Court.<sup>265</sup> Moreover, the High Court has long construed the Article I and III provisions that authorize Congress to ordain and establish “from time to time” such “inferior Courts”<sup>266</sup> as it deems appropriate to grant legislators the lesser power to create lower federal courts of limited jurisdiction.<sup>267</sup> Thus, the Bush Order’s provisions which authorize indefinite detention of non-citizens, thereby precluding relief that might otherwise be available through the habeas corpus writ, and which expressly eliminate federal court power to hear claims pursued by or on behalf of those individuals who are subject to the Order, even more substantially invade the constitutional province of Congress than did President Truman’s steel seizure initiative. Hence, we conclude that these provisions in the Bush Order violate the Constitution.

### *1. Applying the Separate Concurring Opinions to the Bush Order*

We believe that our synthetic approach to Justice Black’s opinion for the Court and the decisions of the other five Justices who held the Truman Administration Executive Order unconstitutional is a fair, clear reading of *Youngstown*. This interpretation has withstood exacting scrutiny over the last fifty years. Yet, even if a court eschewed our evaluative framework, President Bush’s recent assertion of authority would not satisfy the various *ratio decidendi* of the remaining Justices who concurred.

The Jackson concurrence is most important in assessing the Bush Order, partly because of its frequent, subsequent invocation, especially then-Justice Rehnquist’s reliance on the decision in *Dames & Moore*.<sup>268</sup> Application of the Jackson concurring opinion to the Bush Order’s provisions that mandate indefinite detention and proscribe

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264. See *supra* notes 20-48 and accompanying text (discussing Article III provisions and Supreme Court caselaw establishing Congress’ role in creating the federal courts and delineating their respective jurisdictions).

265. See U.S. CONST. art. III, § 2, cl. 2. See also *supra* notes 20-33 and accompanying text (discussing relevant caselaw interpreting this provision).

266. See U.S. CONST. art. III, § 1; see also U.S. CONST. art. I, § 8, cl. 9 (empowering Congress “To constitute [t]ribunals inferior to the supreme Court”). See generally *supra* notes 34-42 and accompanying text.

267. See *supra* notes 43-48 and accompanying text (discussing relevant caselaw).

268. See *supra* notes 166-70, 228-46 and accompanying text (discussing the enduring significance of Justice Jackson’s concurrence and the determination’s relevance to the *Dames & Moore* case).

any federal judicial intervention would yield the conclusion that they are unconstitutional. For the previously-discussed reasons, which show those provisos contravene legislative will,<sup>269</sup> Justice Jackson would have situated the provisions within his third category, when executive power is at its nadir. Jackson's *Youngstown* concurrence also teaches that the federal courts must rigorously scrutinize presidential claims of authority within this classification, and impose substantial burdens on parties which proffer the assertions and uphold the power only if the Constitution disables Congress from acting on the matters.<sup>270</sup> Justice Jackson would probably have concluded that the Bush Order's questionable provisos could not satisfy these stringent tests, in particular because the Constitution explicitly assigns lawmakers the power and the responsibility for prescribing federal judicial jurisdiction.<sup>271</sup>

The decision that Justice Rehnquist authored in *Dames & Moore* would have similar applicability to the Bush Order. Even if a court viewed the President's assertions of authority for detaining indefinitely non-citizen suspects and for proscribing federal judicial jurisdiction along the spectrum developed by the Rehnquist gloss on the Jackson concurring determination, rather than as within one of Jackson's three discrete groupings, the claims would be considerably nearer an express legislative prohibition than an explicit congressional authorization.<sup>272</sup>

Application of the remaining *Youngstown* concurrences would yield analogous results. Nonetheless, we accord those opinions comparatively limited treatment here, as the decisions have less relevance for the issues that the Bush Order raised, partly due to their somewhat infrequent citation and to the passage of time. For example, Justice Felix Frankfurter's firm conclusion that Congress had withheld seizure power from President Truman<sup>273</sup> strongly suggests the jurist would find lawmakers had not granted President Bush authority for detaining non-citizen suspects indefinitely and for suspending all

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269. See *supra* notes 57-105 and accompanying text.

270. See *supra* notes 166-204 and accompanying text (analyzing Jackson's *Youngstown* concurrence).

271. *Supra* notes 187-88 and accompanying text.

272. Again, the reasons we give above for finding that the Bush Order's relevant provisions conflict with congressional will, see *supra* notes 57-105 and accompanying text, support characterization of those provisions as nearing the express-congressional-proscription end of Justice Rehnquist's spectrum of presidential power.

273. See *supra* notes 148-65 and accompanying text (discussing Frankfurter's *Youngstown* concurrence).

judicial review of actions taken under the Order, even in the absence of a specific legislative enactment. Just as Justice William O. Douglas determined that the governmental branch with the “power to pay compensation for a seizure is the only one able to authorize a seizure or make lawful one that the President has effected,”<sup>274</sup> he would similarly conclude that the Constitution’s commitment to Congress of the power for establishing the federal judiciary and prescribing its jurisdiction excluded unilateral presidential abrogation of federal court jurisdiction that lawmakers had statutorily granted.<sup>275</sup>

In sum, under either our proffered synthesis of the various *Youngstown* opinions or the analytical techniques applied in the separate concurrences, the Bush Administration Executive Order does not pass constitutional muster, to the extent the directive purportedly authorizes the indefinite detention of non-citizens and proscribes the exercise of federal judicial jurisdiction provided by legislation. We appreciate that some readers could misunderstand our conclusions, because the constitutional questions which the Bush Order presents and application of the *Youngstown* precedent to these issues are simultaneously complex and subtle. Thus, the article’s final section attempts to anticipate numerous, possible ways that observers might improperly construe the views we espouse, to clarify those perspectives, and to identify the broader, enduring ramifications of the admittedly narrow claims that our arguments support.

## V. Limiting Clarifications and Broader Implications

### A. What we do *not* Contend

This part emphasizes the narrowness of the determinations that we have reached by applying *Youngstown* to the Bush Order. Our focus has been the provisions that ostensibly permit indefinite detention and preclude federal judicial relief. Therefore, we proffered no assertions regarding other aspects of the directive. More specifically, the analysis provided does not require the conclusion that the Chief Executive lacked power to promulgate the Order’s important provisions authorizing military tribunals to try alleged war crimes which

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274. *Youngstown*, 343 U.S. at 631-32 (Douglas, J., concurring).

275. See *supra* notes 264-67 and accompanying text (arguing that the Constitution’s delegation to Congress of the duty to create and limit federal court jurisdiction required the conclusion that this same authority was not also within the President’s power as commander-in-chief). The ideas that we examined above would similarly apply to Justices Harold Burton and Tom Clark. See *supra* notes 211-14 and accompanying text.

specific individuals responsible for the September 11 attacks committed. Our article acknowledges the strength of claims that submitting the trial of persons accused with war crimes to military commissions invokes a tradition of earlier presidents, who exercised their constitutional power as commanders-in-chief,<sup>276</sup> and that Congress has preserved this conventional executive prerogative by statute.<sup>277</sup> In light of these contentions, we assume for the purposes of argument that the President may create military tribunals without express legislative authorization, a contested issue on which our paper expresses no opinion.<sup>278</sup>

Despite the concerns surveyed, the Bush Order's additional assertions of power to detain suspects indefinitely, whether or not they are tried, and to prohibit all judicial review of the directive or any actions implemented under it merit separate constitutional scrutiny. Indeed, for the reasons articulated in section four, we believe that the Order's provisions, which allow unlimited detention of non-citizens and nullify federal court jurisdiction granted by statute, unconstitutionally intrude upon legislative authority delegated to Congress. It bears reiteration that our firm conviction respecting invalidity encompasses only the most extreme provisions included in the directive.

We similarly underscore that the argument which challenges the constitutionality of the Bush Order's jurisdiction-stripping provision<sup>279</sup> preserves only that federal court jurisdiction and those rights and remedies which federal law otherwise affords, whatever their extent. Our article leaves unresolved potentially salient questions about the

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276. See, e.g., ABA REPORT & RECOMMENDATIONS, *supra* note 14, at 2-6; Bradley & Goldsmith, *supra* note 76, at 250-52. See generally WILLIAM E. BIRKHIMER, *MILITARY GOVERNMENT AND MARTIAL LAW* 351-69 (3d ed., rev. 1914); David J. Bederman, *Article II Courts*, 44 MERCER L. REV. 825 (1993); Paust, *supra* note 10.

277. See ABA REPORT & RECOMMENDATION, *supra* note 14, at 2-6. See also Bush Order, *supra* note 3 (citing Uniform Code of Military Justice Article 21, codified at 28 U.S.C. § 821, as authority for the Order); Bradley & Goldsmith, *supra* note 76, at 253; Dinh, *supra* note 19, at 405; Feldman, *supra* note 19, at 471-72.

278. Compare George Lardner Jr., *Democrats Blast Order on Tribunals; Senators Told Military Trials Fall Under President's Power*, WASH. POST, Nov. 29, 2001, at A22 (reporting Assistant Attorney General Michael Chertoff's testimony that President Bush had power to authorize trial by military commissions absent congressional action or approval), with 148 CONG. REC. S741 (daily ed. Feb. 13, 2002) (statement of Sen. Leahy) ("Military tribunals may be appropriate under certain circumstances, *but only if they are backed by specific congressional authorization.*") (emphasis added); Katyal & Tribe, *supra* note 4, at 1388-93 (arguing that 28 U.S.C. § 821 does not supply authority for the Bush Order), and Paust, *supra* note 10, at 9 (same). See also U.S. CONST. art. I, § 8, cl. 9 (empowering Congress "To constitute Tribunals inferior to the supreme Court").

279. See Bush Order, *supra* note 3, § 7(b).

availability, under existing statutes, of the habeas corpus writ to particular individuals detained outside of United States territory.<sup>280</sup> We do not address whether persons who are subject to the Bush Order and can somehow invoke the jurisdiction of a federal court might have meritorious substantive claims for relief from any or all of the directive's provisions or from specific actions that the Administration institutes under the Order. The issues receive no treatment here principally because they are beyond this paper's scope and partly because predicting which of myriad factual scenarios will actually arise and be litigated is difficult. In short, the article shows merely that the provision in the Bush Order which attempts to eliminate federal court jurisdiction is an invalid usurpation of congressional power.

Our research finds that the Constitution authorizes the legislative branch, rather than the Chief Executive, to prescribe the federal judiciary's jurisdiction, and that the Constitution imposes limitations on the power granted. It may well be that lawmakers can no more supplant federal court jurisdiction by statute than President Bush is able to attain a similar result through executive order. Even if Congress ratified the Bush directive's provisions that deprive federal courts of jurisdiction and indefinitely detain non-citizens, the legislation adopted would raise serious constitutional doubts, although this sharply-contested, intractable question also exceeds the paper's compass.<sup>281</sup> In any event, our contention here is simply that those provisos in the Bush Order violate the Constitution because they exceed the Chief Executive's authority when acting alone.

Finally, we do not question the good faith of President Bush or other executive branch officials, challenge the need for an efficacious response to terrorism, or minimize the grievous losses inflicted in the terrorist attacks or in subsequent efforts implemented when combating terrorism. The Bush Administration acted out of understandable, laudatory concerns about treating in the strongest feasible manner the horrific terrorist strikes and the continuing threat of attacks. Nonetheless, as Justice Jackson's *Youngstown* concurrence admonished, the United States must resist "the infirmity of confusing the issue of a power's validity with the cause it is invoked to promote."<sup>282</sup>

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280. See *supra* note 10 (discussing issues raised, but not resolved, in the *Eisentrager* litigation).

281. See Katyal & Tribe, *supra* note 4, at 1334-35 (identifying serious Due Process concerns raised by Order's denial of appeal right to an entity independent of executive). Cf. *supra* note 33 (citing cases and commentary concerning constitutional limits on Congress' power to restrict federal court jurisdiction).

282. *Youngstown*, 343 U.S. at 634 (Jackson, J., concurring). See also *id.* at 594 (Frank-

### 1. *Broader Implications of the Bush Order*

Justice Jackson concomitantly warned of the strong “tendency [] to emphasize transient results upon policies . . . and lose sight of enduring consequences upon the balanced power structure of our Republic.”<sup>283</sup> The subpart above stressed the narrow character of the determinations proffered. We also acknowledged that a federal court could well find future litigation contesting the Bush Order warrants dismissal based upon a jurisdictional defect wholly independent of the directive’s jurisdiction-stripping provision or might address the merits and consider the administration’s commitment of war crimes (among other) allegations to military tribunals to be a valid application of the President’s commander-in-chief power. Because our conclusion is limited in nature, some readers may question its significance. We believe, however, the present assertion of executive authority to detain non-citizens indefinitely and to suspend the exercise of federal judicial jurisdiction threatens “the balanced power structure of our Republic” with “enduring” harm.

If President Bush possesses the power for eliminating federal court review of actions pursued under the November order, what would prevent future chief executives from recurring to this same authority whenever they perceive or allege the existence of new emergencies?<sup>284</sup> Granting the Bush Administration’s apparent assumption that the presidential role as commander-in-chief permits the officer to preclude all judicial interference with the war on terrorism’s prosecution, even insofar as suspects arrested domestically are concerned, it would seem to follow that chief executives could suspend federal court jurisdiction anytime its exercise might frustrate military efforts. In light of modern warfare’s realities, which pit not only soldier against soldier but also the economic and technological development of nation against nation, the presidential power to proscribe federal judicial jurisdiction would, indeed, cover an extensive spectrum of cases and controversies.<sup>285</sup> We submit that here, as with

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furter, J., concurring) (stating “[t]he accretion of dangerous power does not come in a day [but] slowly, from the generative force of unchecked disregard of the restrictions that fence in even the most disinterested assertion of authority”).

283. *Youngstown*, 343 U.S. at 634 (Jackson, J., concurring). See also *infra* text accompanying note 295.

284. See generally ROBERT HIGGS, *CRISIS AND LEVIATHAN: CRITICAL EPISODES IN THE GROWTH OF AMERICAN GOVERNMENT* (1987) (concluding that governmental powers first asserted in a time of crisis are often stabilized and resorted to even after the crisis has subsided); *infra* note 295 and accompanying text.

285. See *Goldman v. Weinberger*, 475 U.S. 503 (1986); *Rostker v. Goldberg*, 453 U.S.

*Youngstown*, such a sweeping conceptualization of the commander-in-chief's authority directly contravenes Justice Black's declaration that the "Constitution [did] not subject th[e] lawmaking power of Congress to presidential or military supervision or control."<sup>286</sup> This perception similarly conflicts with Justice Jackson's statement that "the Constitution did not contemplate that the title Commander in Chief of the Army and Navy will constitute him also Commander in Chief of the country, its industries and its inhabitants."<sup>287</sup> James Madison correspondingly observed in *The Federalist* No 47: "The accumulation of all powers legislative, executive, and judiciary in the same hands, whether of one, a few or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny."<sup>288</sup>

When, as here, the authority claimed is the power to shelter the president's own executive orders and other instructions from any judicial consideration, the danger of future abuse seems even greater than in *Youngstown*. The United States enjoys a venerable, but simultaneously fragile, tradition that its governmental officials are not above, but rather subject to, the law.<sup>289</sup> Throughout American history, the federal courts have vigilantly guaranteed that those officers, including chief executives, stayed within lawful bounds.<sup>290</sup> Recognition of presidential authority (in addition to, and distinct from, that of

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57 (1981); *United States v. O'Brien*, 391 U.S. 367 (1968); *Meinhold v. U.S. Dep't of Def.*, 34 F.3d 1469 (9th Cir. 1994).

286. See *Youngstown*, 343 U.S. at 588. See also *supra* notes 134-36, 139, 141 and accompanying text.

287. See *Youngstown*, 343 U.S. at 643-44 (Jackson, J., concurring). See also THE DECLARATION OF INDEPENDENCE para. 14 (U.S. 1776) (charging that the King has "affected to render the Military independent of and superior to the Civil Power"); *Laird v. Tatum*, 408 U.S. 1, 19 (1972) (Douglas, J., dissenting) (concluding that this clause restricts the military's power); *supra* notes 91, 134-36, 191-92 and accompanying text.

288. THE FEDERALIST NO. 47, *supra* note 219, at 301 (James Madison). See also *Reid v. Covert*, 354 U.S. 1, 11 (1957) (declaring that the "blending of executive, legislative, and judicial powers in one person or even in one branch of government is ordinarily regarded as the very acme of absolutism"); *Duncan v. Kahanamoku*, 327 U.S. 304, 322 (1946) (Burton, J., dissenting) (proclaiming that the Founders "were opposed to governments that placed in the hands of one man the power to make, interpret and enforce the laws").

289. See THE FEDERALIST NO. 69, *supra* note 219, at 416 (Alexander Hamilton) (emphasizing that the president, unlike a monarch, is subject to the rule of law). For examples, see *supra* notes 164, 214.

290. See, e.g., *Clinton v. Jones*, 520 U.S. 681, 703 (1997) (observing that "we have long held that when the President takes official action, the Court has the authority to determine whether he has acted within the law"). See also *United States v. Nixon*, 418 U.S. 683 (1974); *supra* notes 164, 190, 214 and accompanying text.



Congress)<sup>291</sup> for dispensing with the salutary check afforded by the review of an independent, co-equal federal judiciary, jeopardizes a principle dramatically more fundamental than the separation of powers, namely “that ours is a government of laws, not of men, and that we submit ourselves to rulers only if under rules.”<sup>292</sup>

For these reasons, even if searching federal court review of detention decisions and related initiatives undertaken pursuant to the Bush Order invalidates no single Administration action, we believe judicial scrutiny has intrinsic value. Therefore, the Chief Executive must eschew the directive’s provisions that authorize indefinite detention of non-citizens, thereby submitting to federal habeas corpus review the lawfulness of any challenged custody. The Bush Administration should consult and follow the World War II example that President Franklin Delano Roosevelt set in *Quirin*. The Roosevelt Administration did not invoke the proviso in its military commissions proclamation which denied accused persons federal court access; instead, the administration submitted to the Supreme Court’s jurisdiction and, accordingly, permitted federal judicial review of military trials.<sup>293</sup> President Bush and executive branch officials have thus far exhibited commendable restraint, especially by prosecuting several high-profile defendants in federal court, rather than in military tribunals.<sup>294</sup> Should the Administration modify this practice and ignore the Roosevelt precedent, a federal court, in an appropriate case, would have the power and the duty to hold unconstitutional the Executive Order’s most extreme features.

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291. See *supra* notes 21-48 and accompanying text.

292. *Youngstown*, 343 U.S. 646 (Jackson, J., concurring). See also *supra* note 194 and accompanying text.

293. See *supra* notes 17, 19, 85. See also Diane F. Orentlicher & Robert Kogod Goldman, *When Justice Goes to War: Prosecuting Terrorists Before Military Commissions*, 25 HARV. J. L. & PUB. POL’Y 653, 656-59 (2002); Mike Allen, *Bush Defends Order for Military Tribunals*, WASH. POST, Nov. 20, 2001 at A14. We emphatically disavow the Roosevelt administration’s discredited actions recounted, and approved, in the case of *Korematsu v. United States*, 323 U.S. 214 (1944); see also *supra* note 191 and accompanying text, *infra* note 296 and accompanying text.

294. See Dan Eggen & Brooke A. Masters, *U.S. Won’t Seek Death for Walker*, WASH. POST, Jan. 16, 2002, at A1; David Johnston & Philip Shenon, *A Nation Challenged: The Government’s Case*, N.Y. TIMES, Dec. 12, 2001, at A1; Steven Lubet, editorial, *A Muslim Lawyer for Moussaoui*, N.Y. TIMES, Apr. 25, 2002, at A31; Katherine Q. Seelye, *Lindh Lawyers and Prosecutors Spar Over Secret Witness*, N.Y. TIMES, May 1, 2002, at A18; Philip Shenon, *Sept. 11 Defendant Who Wants to Represent Self Is Busy Doing So*, N.Y. TIMES, Apr. 30, 2002, at A22. See also *Winging it at Guantanamo*, *supra* note 15; *U.S. Adds Legal Rights in Tribunals*, *supra* note 78.

## VI. Conclusion

President George W. Bush responded to the heinous September 11 terrorist attacks by issuing an Executive Order that not only authorized military commissions to try individuals whom the United States prosecutes domestically for crimes implicating terrorism but also denied these persons access to federal court. President Bush's assertion of power usurps legislative authority that the Constitution expressly grants Congress to establish the judiciary and delineate its jurisdiction. We urge the Bush Administration to forego reliance on the provision that ostensibly precludes federal courts from reviewing detentions or military commission judgments under the Order. This claim to power would undermine legislative and judicial authority, threatening the delicate balance among the federal government's branches.

President Bush should heed the trenchant admonitions uttered in closely-related contexts more than one half century ago by Justice Robert Jackson, a preeminent American jurist. Jackson astutely warned:

[The] vague, undefined and undefinable 'war power' [is] the most dangerous one to free government in the whole catalogue of powers [, because] [i]t usually is invoked in haste and excitement when calm legislative consideration of constitutional limitation is difficult [and] [i]t is executed in a time of patriotic fervor that makes moderation unpopular.<sup>295</sup>

President Bush must similarly reject the principle of executive branch supremacy which "lies about like a loaded weapon ready for the hand of any authority that can bring forward a plausible claim of an urgent need"<sup>296</sup> and upon which the Bush Administration has seized, as this

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295. *Woods v. Cloyd W. Miller Co.*, 333 U.S. 138, 146 (1948) (Jackson, J., dissenting). See also *United States v. Robel*, 389 U.S. 258, 264 (1967) ("It would indeed be ironic if, in the name of national defense, we would sanction the subversion of one of those liberties . . . which makes the defense of the Nation worthwhile.") See generally *TRIBE*, *supra* note 7, at 669-70; *supra* note 182, *supra* note 284 and accompanying text.

296. *Korematsu*, 323 U.S. at 243, 246 (Jackson, J., dissenting); see also *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 165 (1963):

The imperative necessity for safeguarding these rights . . . under the gravest of emergencies has existed throughout our constitutional history, for it is then, under the pressing exigencies of crisis, that there is the greatest temptation to dispense with fundamental constitutional guarantees which, it is feared, will inhibit governmental action.

*Ex Parte Milligan*, 71 U.S. (4 Wall.) 2, 120-21 (1866) ("No doctrine, involving more pernicious consequences, was ever invented by the wit of man than that any [constitutional] provisions can be suspended during any of the great exigencies of government.") See generally *supra* notes 191, 293 and accompanying text.

precept's application could jeopardize the Constitution that has served the United States exceptionally well for two centuries.<sup>297</sup>

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297. With all due respect, the failure to follow the sage advice proffered by Justice Jackson could warrant comparison between George Bush and President Truman, whose assertion of power for seizing U.S. steel mills the jurist analogized to the "prerogatives exercised by George III." *See supra* note 190 and accompanying text.